2005-42-0

Rees Gratis

Letters

Volume V

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Real Property

Reeves Goulds Lectures

Volume V

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Real Property

Real Property

Real Property &c

James Gould Esq.

Under this general Division will be considered many different ones, of which we are mainly elucidate & to be found in Books I shall take but a brief and general View.

By Things, & Corporeal are meant the Subject of Property in which one may have an Interest, and are of two Kinds "Viz"

Real and Personal.

By things Real is not meant merely the Interest we may have in such subject but the thing itself.

2 Bl. Com 16 384-387. 2 Madison. 4

Things Real are such as are permanent & fixed and immovable All other things are by Corporeal denominated as Goods, Wares, Merchandize, money and Chattels real. Chattel real is a Personal right in a real Subject — Chattels personal includes all personal Property.

Coke Lit. 11. also Institutes 118.

Things Real consist of Lands, Tenements and Hereditaments — The term Land comprehends every thing of a permanent, substantial & corporeal nature.

Tenement in the legal sense signifies every thing which may be holden and is of a permanent nature. Whether it is corporeal or incorporeal. Lands never mean incorporeal Property.

1 Inst. 6 — Do. 19. 20. 2 Bl. Com. 17

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Hereditaments is a word now generally
used and includes not only Land but every
thing which may be inherited whether
3 Coke - 20 be real personal or mixed: corporeal incor-
2 Bl Com 17. poreal &c (eg) an heir loom which is in person
a Chattel by custom descendible and though
strictly personal and moveable is nevertheless
an hereditament as being inheritable. ——
Hereditaments are Corporeal and Incorporeal

1 Inst 19ª. 11. Corporeal consists of objects of sense fixed
2 Bl Com. 17 and substantial or Physical entities and in-
Do - 8. 18. cludes not only Land but Waters, buildings &c
and every thing permanent thereon. ——
Land in common parlance or Land every thing thereon passes
with the left especially named. ——
Water being of a transient and fluctuating
nature an action will not lie to recover it
2 Bl Com 18 "eo nomine" because one cannot have any more
than an exclusive property therein. therein it
must therefore be sued for as Land by Land can
and with Water.
Land in the legal signification has an in-
2 Bl Com 18 definite extent upwards and downwards.
1 Institutes A conveyance of Land therefore conveys also
.4.5.6. every thing permanent both over and under
it as Fossils minerals tenements Reproofs &c
Here trees houses &c be conveyed of themselves
but Water can only be conveyed with the Land
by Water is conveyed only a Piscary or the use

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An Incorporeal hereditament is an invisible right issuing out of, annexed to, or arising from some corporeal thing, as rent, a right of way, &c which incorporeal hereditament & right is called an Easement. 1 Inst 19-20. 2 Bl Com 19-20.

There is a distinction to be noticed between the incorporeal hereditament itself, and the profit or profit arising therefrom. Viz. That right to the profit is incorporeal and not an object of sense, yet the cattle & the profit extracted is and must be an object of sense. 2 Bl Com. 20-1

At Com Law there are 10 kinds of Incorporeal hereditaments for which see 2 Bl Commentaries 21 Page. —

A right of Common is that which one has to the profit in or upon the land of another.

Of Piscary.

On this subject very little is to be found in any of the Elementary Writers. I therefore will lay down some general rules on the subject & discuss them in modern practice

In navigable rivers the right of Soil or Fishery is by Com Law "prima facie" in the King, or Them in the States. But the right of fishing in such navigable rivers is "prima facie" in all the Citizens. But in a river not navigable the Bottom 4 Binn 2, 164. 1 Mood 105. 6 Do 73. 1 Salk 637. 3 Keble 242. 1 Dan 425. 4 Rep 39.

on

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a right of fishing in common with the adjoining Proprietors who hold to the opposite shore. A navigable River is presumed to be a River not navigable where the right of fishing is annexed to the right of soil of the adjoining proprietor but Primâ Facie the exclusive right of fishing & other profits of the soil on both sides of the channel of such river adjoining his land. The right of soil in the bed of a navigable River when vested by the State in an individual is a several & not a common right.

5 Coke 107
2 Bosanquet & Pullen 472
Doug 326
Hay & Hawk 12
Hale de jure maris 20. 27

The remarks concerning navigable Rivers apply strictly to the Sea Shore between high and low water mark, and though an individual owns Land adjoining the Sea Coast he has not a common an exclusive right of fishing between high and low water mark. Custom confined in Spain according to high water mark, and therefore no better right than any one else to fish between high water mark.

2 Bl Com 103
1 Inst 6 - 345
17 Rep 411
1 Roll 228
2 Roll 165
2 Vern 338
3 Ch Cas 414
1 Ch Ca 413 14

To succeed with the Estate in Land. Settlement and Herediaments and Freehold Estates of Inheritance. By Estate is meant the Interest one has in Land & Tenements. Herediaments, and by one of the term Estate is stood to mean both the thing and the interest in the thing as Holt [illegible]

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The word Estate does "prima facie" imply the quantity of interest in the thing. Estate often used to denote not only the interest in the thing itself as well as the interest in it.

The quantity of interest is always gauged neither by the time of its duration, hence arises the primary division of Estates into Freehold and less than Freehold.

A Freehold is such an Estate as by Com. Law must be conveyed by "Livery of Seisin" or corporal investiture & in Incorporeal property by something equivalent thereto. 2 Bl. Com 104 Litt. Sec. 59.

Freeholds are of Inheritance and not of Inheritance — Freeholds of Inheritance are divided into Absolute or Fee simple and Limited.

A Fee-simple absolute is one given to one and his heirs forever without any restriction. 2 Bl Com 104 Do 105.

The term Fee is synonymous with fund or land and used in contradistinction to Allodium.

Allodial Estates are such as are held absolute and subject to no superior.

A Fee on the contrary is an Estate held under a superior. Such are all Estates in England as being in Law held of the King. 2 Bl Com 45 7 Do 104 5.

The King only has an Allodial Estate. In England & Subjects can but only the "usufruct." D° 62.

In Connecticut all Estates in fee

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St & Com 434

Fee or Allodial is with us an Estate in Fee simple are an Allodial Estate are the same thing. Fee and Allodium both signify absolute

2 Bl Com 106

Estate, and is generally used to denote an Estate descendible to inheritable Estate.

2 Bl Com 106

The term Fee without any adjunct is always understood to mean a Fee simple that being the largest estate known.

Litt 741 & 10
2 Bl Com 20
D° 100 & 107

A Fee in this sense may be had in any Hereditament corporeal or incorporeal

Demesne signifies the thing or estate in which one has an Estate.

Dyer 25 pl 85
285. 286.
20 & 21 Eliz Com 262

It is a general maxim of Law that the Fee of Lands Tenements and Hereditaments must at all times abide in some one i e it cannot be in abeyance or suspension.

As in a Devise to A for life remainder to the heirs of B. but as A dies in the life time of B. so as the Estate to the Heirs of B. should not vest in any person but the heir who can take by descent during the life of B. this cannot be a good devise for the Fee is in abeyance till the death of B.

2 Bl Com 110

This Maxim is founded upon the Law of Feudal Tenures as well as the Law that it is not lawful to have a new mesne Lord of the

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Lecture 2nd

I said that it is a General Maxim of Law that the Fee Simple of Lands &c must vest somewhere and cannot be in Abeyance and that Blackstone is incorrect. —

So in the case of a Grant to a sole Corporation. Blackstone says the Fee Simple may be in Abeyance. It can scarce be thought because the Successor can never be known. But if it is not Fee Simple it can never be known to be it in the Corporation, and the Maxim will be infringed upon the Principle of the Property. The Land certainly cannot pass from the Dead and surely if the Fee is not in the Corporation it is then in the Devisee or in other cases of Contingency. So that it is not in Abeyance

2 Bl Com 110
2 Atk 334 & 3046.

Again says Blackstone when the Parson dies before his Succession is named the Freehold is in Abeyance from the death of the incumbent till the Induction of his Successor — But at the same time such a retrospective property in the Freehold by which after his Induction he may recover back all the rents &c which have accrued during the vacancy. Evidently not be in Abeyance else the Successor would have had no right to the accrued rents. — For any reason the Freehold is not in Abeyance for if not vested in the Successor it vests in the Grantor during vacancy.

2 Bl Com 107.

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The word Heirs is the substantive ordinarily necessary to convey a Fee simple Estate and to it is added the word Ever as a mere form of words, and the word Body in Common Deeds expresses the quantity of Interest or Estate. No words will be a substitute for it.

The word Issue is not necessary nor is it used to shew any right which they have in the Freehold. But to shew what quantity of Interest the ancestor or Grantee takes and that the Grant only vests his Estate in Life.* & for this Rule the Reports of Judges strictness as the Grants were always purchased to be made in consideration of some Personal Services of the Grantee and consequently would never extend further than the termination of his services unless expressed in the Grant.

* See as on this rule Page 284.

2 Blk. Com. 311 10th. 108 Litt. Sec. 1 81

Authorities supra

"Where the word Issue is used in a Grant or Devise it is construed as words of purchase though it is usually used by way of limitation.

But in Devises or conveyances by last Will and Testament the word Heirs is not necessary to convey an Estate. A mere Verbal Recommendation however will not suffice to establish a Devise although to die seized" in articulo mortis" have been esteemed sufficient.

(validity)

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perpetuity shall shew the intention of the Devisor to give a fee simple is sufficient to shew so that the same words which in a Deed will convey a fee simple will in a Grant or Deed convey only a life Estate e.g. a Grant to A of Blackacre for ever gives him only a life Estate. But a Devise in the same words or thus "I devise Blackacre to A" without any words of perpetuity gives a fee simple. (Gawlor 639 2 Bl Com 108)

The reason of this distinction is that a grant is to be taken strictly but the latter more liberally. In a Devise the intention of the party governs. But in conveyances by Deed the Technical Rules of Law are adhered to. (2 Bl Com 108)

But all Devises being in derogation of the law the intention of the Devisor must be manifest. (2 Bl Com 108)

N.B. I would observe here that a Devise of the right or legal title of property without words of perpetuity conveys only a life Estate. e.g. a Devise in these words "I devise Blackacre to A." conveys only a life Estate, but if thus "I devise all my Estate or interest in Blackacre to A." gives a Fee.

A Devise to A and his Heirs merely will not convey a Fee.

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1 Salk. 236
Carthew 55 6
Do. 346
1 Vern. 13 412
2 Do. 657
4 Co. 23
5 Co. 5.62
8 Co. 34
67. 502.

A Devise in the words "I give" I give to A all my Estate (the Devisor having a Fee in such Estate) conveys a fee (i.e.) what soever the Devisor intended to such Estate that intent is to be taken to the Devisee in the words

What is the difference in a Devise between the terms Land and Estate? Answer The word Land (when set without any words of perpetuity) conveys only a Life Estate. because it is originally made to the subject but the word Estate without words conveys a Fee because primâ facie it comprises the interest in the subject and as the devisor may be intended both the subject and the interest

17 Vin. 13 411
2 Atk. 37
1 Vern. 228.
Carthew 355.
2 Ld. Ray. 824
2 Ray. 614

It has been holden that "all my Estate" coupled with a local description conveys only the subject as a Life Estate but this opinion is not sustained by the Books and seems not to be Law. & the distinction between "all my Estate" and "all my Estate in a particular place".

Thus a man "I give all my Estate in the occupation of B to A." this says Lord Hardwicke, conveys only a Life Estate because he gives only what B possessed (i.e.) in his occupation. so much as is in the occupation of B. and no further than that is in himself. But Lord Hardwicke observes "obiter dictum" Ld Hardwicke. is also doubtless established with the case to come.

1 Ves. sen 228.
1 Dick. 229

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Again "I give all my Estate real and personal." — Cowp. 299; 1 Eq. Ca. Ab. 33; 3 Do. 516; 2 New Rep. 343.

Lord Hardwicke says a Devise in these words "viz" "I give to A all I am worth" conveys a Fee simple if I have a Fee simple. — 1 Bibb 437; 8 Rep. 66.

It is said that a Legacy in a Devise may signify a device of Real Estate, and when the intention is manifest may convey a Fee simple. Legacy is generally included in Personal Property. — Dougl. 39; 1 Ves. 182; 1 Burr. 268; 5 Rep. 7 16; 1 Eq. Ca. Ab. 37 pl. 6.

It has been questioned whether the word Hereditaments "per se" conveys a Fee — Mr. Gould thinks it does not. Coke says the term is appropriate only of the subject, and I think that a Devise of a real subject merely (i.e.) "to A" conveys only a Life Estate whether the subject be Lands, Tenements or Hereditaments. It has sometimes been supposed to convey a Fee because of an imagined similarity of import between Hereditaments and Inheritance. Though there is not necessarily any such similarity of import. — 5 Rep. 55 b; 3 Rep. 3 56; 6 Rep. 17 5; 8 Rep. 47; 1 Bacon Abr. 338.

Where a Will runs thus "I give and devise all my Estate to A on payment of 1000£ to other pecuniary legatees to B. this will convey a Fee — Fonb. Devises 562 n. and Fitz. 281; Do 283.

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3 Keble 49
1 Bac Ab 130
2 Burr 1023
3 Ke 358

See similar Case where devise to A might be a loser as he might pay 1000 £ to devisee and die tomorrow - take them if he took only an Estate for Life he would be a loser.

6 Coke 16
2 Vern 343
Cowp 234
3 Atk - 87

Devise my Estate in Land to B his Heirs 100 £ to A and his Heirs and subject thereto a Life Estate devise in this case unlike the last B could be a loser as the Estate itself is to pay the 100 £ to A.

6 Coke 16
3 Keb 133
Burr 533
1078. 1023
2 Bl Com 287.

Again if one devise Land to A in consideration of A paying a certain annual value in saying an annual rent less than the annual value. A has only a Life Estate: and thus in the same principle as in the cases above.

From these I conclude if he had been required to pay a rent greater than the annual value he would take an Estate in Fee. This is however an inference of my own (J Gould) drawn from the above rules.

2 Bl Com 108
Do 354.
Do 357.

Another question to the Gen. Rule respecting the word "Heirs" to devise a Fee. If in a Conveyance by Deed and Common Recovery where the word Heirs, - by Limitation and Use &c &c.

2 Bl Com 108.

So in a Grant to a sole Corporation the word Heirs is not only necessary to convey a Fee but even inserted in the first Place because "Successors" is the word

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and secondly. It is improper because the word heirs would give the inheritance to the heirs of the Body Corporate himself. ——

Body in a Corporation Aggregate not the heirs. nor Assigns is necessary to convey a Fee the first is included and the other useless. because when one executes a Grant to another without any limitation the Law presumes the Grantee to hold during Life. but in contemplation of Law such a corporation never dies.

1 Bl Com. 484
2 Bl Com. 109

In England a Grant of Land to the King will pass a Fee without the word heirs because in the first place the King in judgment of Law never dies. and therefore the Gen. Rule on this subject yields to the royal Prerogative. You must for exceptions to the Gen. Rule that the word heirs is necessary to convey a Fee simple. ——

1 Bl Com. 244
2 Bl Com. 109

Some general Rules will be important on the subject of Estates of Inheritance. Heirs is a technical word of Limitation. and not descriptive of the Purchaser. ——

If an Estate be limited to A for Life. with remainder to his heirs general. A takes an inheritance or Fee simple. But if "to A for Life. remainder to the heirs of his body" immediate or immediate A takes but an Estate Tail.

1 Pr. Wms 480-1

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This is the Great Rule in Shelleys Case which is the Great Magna Charta on this subject. And that great Rule is, that the remainder is mediate or immediate in all deeds to the Person that Legally Estate may intervene in the heir in fee, the same is done whether no such intermediate Estate is just as strong to the ancestor, as by the terms of the Deed or Gift at the same time in Law.

Thus if an Estate be given to A for Life remainder to B remainder to the heirs of A. A takes a Fee subject to the intermediate remainder to B

So if to A for Life with remainder to B remainder to the heirs of the Body of A. then A takes an Estate Tail subject as above to the intermediate Estate.

Where an Estate is given to A for Life with remainder to his heirs general in Fee simple immediately in Antiposition.

But if given to A for Life & Remainder to B. remainder to the heirs of A. then A takes Cute a fee in Law & and can have a fee in Possession notwithstanding the intervention of B's remainder to his death.

Because Heirs is a Nomen Juris a word of limitation describing the quantity of interest to be conveyed. But if it may be a word of purchase description of the person of the heirs & the Grantee will take only an Estate for Life.

16 Coke - 93
Shelleys Case
104. 105
Foane 2 Rol
42 to 48
79 to 82
90 to 92
101. 107. 112
125. 294
11 Coke 79 a
4 Leke 82
Do 294
7 Coke 33.
Wild Notice
is given at
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Lecture 3rd

In General the word Heirs is a word of "limitation" descriptive of the Estate or Interest of the ancestor and not a "Descriptio Personæ".

Thus a Devise "to the heirs of A" convey no Estate to them until the death of A. as during his Life he is incapable of Law has no heirs. Neither can they take an Estate after A's death unless A dies before the Testator. This Estate so granted to the heirs of A is what in Law is called a "Contingent Remainder".

But if "heirs" is accompanied by other words showing it not to be a word of limitation, but of description, the heirs may take as such even in the life-time of A the Devisee. e.g. a "Devise to the heirs of A who is now living" shall be construed according to the evident intention of the Devisor.

An Estate in Fee can be aliened free of any of its legal qualities or clogged with any conditions repugnant to the nature of the Estate. e.g. A devises a Fee Simple Estate to B. with the condition that he shall never alien it. This condition is null and void and the Devise is good to convey a Fee.

How much of Fee simple

2 Ray 332
2 Vez 313
Cowp 313
Dy 314

2 Ray 330
1 Ves 229
1 Fonb 421
2 Fonb 343
2 Ruiss 232
2 B & P 1010
2 Bur 1100

1 Inst 13
8 T Rep 61
Doug 329

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Of Fee Tail

2 Bl Com 109

Estates Tail are such Estates of Inheritance as are clogged with some Condition or qualification. Of which there are two kinds viz. Qualified or Base Fee - 2nd Fees conditional & at Common Law as altered by the Statute "de donis" have become Estates Tail.

1 Inst 1a 27
2 Bl Com 109

A Base Fee is one which has some qualification annexed and which must determine when such qualification is taken notice of "to A and the heirs of his Body" see Blackstone.

2 Bl Com 113
Plowden 241

Fees Conditional at Common Law were such as are attained to particular sorts of the Donee's Issue called conditional because of the condition expressed that it shall at any time cease if the Grantee should die without Issue. The Land shall revert to the Grantor.

1 Inst 16a 19
2 Do 283-4

By the ancient Law Issue Inheritable of different sexes for certain Numbers a Judgment of the Condition

1st It thereby became absolute in Him so as to enable him to alienate it.

2nd It subjected it to forfeiture for Treason in the Grantee.

3rd It enabled the Grantee to encumber the Estate so as to bind his Issue.

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But the limits of issue did not make the Grant absolute for all purposes. —

As if the Grantee had issue which died before him. and he did not alienate the Estate on his death would revert to the Donor 2 Bl Com 110 Do 111.

If the Grantee left issue on his death the Estate became absolute in his issue. Authorities supra

But this Rule that Limits of issue were a performance of condition for the above purpose was a clear violation of the spirit of the Com Law Rule. and of the intention of the Grantor to remedy which the Statute de Donis was enacted in the reign of Edward 1st providing that the intention of the Grantor should be observed. and that Limits of issue shall make the Estate absolute in the grantee for no purpose — If there are no issue the land shall revert to the Grantor and so could not alienate it. 2 Bl Com 113 2 Vezey 170 3 Bl Com 320.

In the construction of this Statute of Westminster the 2nd the Judges held that the Grant was divided into two kinds of Estates. viz an Estate Tail. to the issue or Donee. and a reversion to the Grantor &c

This Fee Tail. originated from the Stat de Donis. and were never known at Com Law when the indeed the Com Law recognized something of a similar nature. Litt Sect 14 or 13

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2 Bl. Com. 113

Tenement is the only word in the Statute de Donis which denotes the subject of property that may be entailed. Hence a Fee Tail may be had in all real property. Land is corporeal, immoveable and permanent, and in every sense answers the meaning of the reality.

2 Vern. 170
1 Bl. Ch. 325.
Cha. Ca. 19.20.

An Annuity cannot be entailed. But it still is a fee conditional at Common Law, because it changes into the nature of the Grantee, and is not a Tenement.

1 Jac. 1. c. 144
Do. 19.20
2 Bl. Com. 113.

Estates conditional at Common Law now generally come within the Statute de donis and are by the Statute fee tail.

2 Bl. Com. 113
1 Ves. 174 & 308
1 Bl. Ch. 271.
Pas. Dec. 1743
Forr. 304.
3 Ves. Jun. 259.

Money, Personal Goods and Chattels cannot properly be entailed - plainly, because it does not come under the denomination of tenements, which only according to the Statute "de donis" can be entailed - Because personal Goods and Chattels being of such a nature, as to be consumed by enjoyment, to be lost or destroyed and the exigencies of Trade require frequent alienation the ancient Common Law ordained that such personal Chattels should not be entailed to create a perpetuity &c.

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A Chattel then must be entailed and the Father, or the Grantor has an absolute property - But this Rule holds only when there is express words of entailment.

It is a clear rule of Law, that words which in intimation of real Estate will by implication create a fee Tail, will convey a remainder in a personal Chattel after a particular Estate, or Life Estate.

17 Ked. 503
Jones 359
3 Rob. 259
1 Do 603
13 Rich. Eq. 215

But never can a Chattel be entailed either expressly or impliedly.

If therefore a Chattel interest be limited to A and the heirs of his body, the Grantee first will take the absolute property, and there can be no remainder to his heirs by such Grant.

The above narration comes under the subject of Executory Devises of which more under that title.

An Estate Tail is never passed, but land created by implication in a conveyance by Deed. I thought it may be inadvertently to the indulgence shown to Wills.

4 Cow. 234
3 Litt. 378
37 Eliz. 83
1 Wilm. 605
Carth. 343
2 Bl. Com. 384

If a devise be made to A and his heirs of his body, but if he dies without such heirs remainder to B. A takes an Estate Tail by implication, because here the word heirs is not used in its proper sense.

17 Ked. 276
1 Jones 170
Do 301
Do 302

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Cowp. 234
5 T.R. 335
5 T.R. 337
3 T.R. 1456
8 T.R. 5.211

Again in a Devise to A and his heirs, for ever, but if he dies without heirs, remains over to B. A taken Estate Tail. If B is a collateral heir to A.

Lill. 371 Sw. 14. 15. 16. 26. 27. 28. 29.
2 Bl Com. 113
Do. 114

The different sorts of Estates Tail are, 1st General or Special.
2nd They are distinguished according to the sexes of the heirs who are to take into Tail Male General & Tail Female General and into Tail Male Special & Tail Female Special.

Lill. 371 & 24
Coke Lill. 25.
2 Bl Com. 114

In descents of Tail Male, the descent must be deduced wholly by heirs Male. And "e converso" in descents of Tail Female the heirs must be deduced wholly by heirs Female. Where one cant take himself or heirs of him if he cant take

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Lecture 4th

At the word "Heirs" is necessary in a Grant to convey a Fee. So the words Grant to A and his Heirs will convey a Fee Tail. Heirs of his body will mean the operative words of the Grant.

A Fee Tail cannot be barred if these words of procreation or inheritance are wanting.

Thus a Grant to A and his Heirs will not pass a Fee Tail because there are no words of procreation and inheritance. Therefore in this case A will take only an Estate for Life.

A Grant to "A and his Heirs male" (or female) passes a Fee simple to A because there are the words of procreation necessary to convey a Fee Tail. But only words of limitation. Such therefore are superfluous. It is impossible to limit an Estate to A and his Heirs male or female specifically for this would be creating a new kind of Estate not known at Com. Law.

Agreeable therefore to the General Rule of construction that a Grant shall be taken most strongly against the Grantor who uses such satisfactory words. It shall take the Fee in this case. This Rule of construction does not apply to the Heirs of Grantee therefore in the

1 Inst s 20
2 Bl Com 114
Do - 115
Do 381

2 Bl Com s 115.
1 Inst s 20

2 Bl Com s 115.
Watk Conv 31.
1 Inst s 27. A
5 Rep s 338.

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5 Rep. 538. Same rule as to lay the King will for all no Estate and is void

5 Rep. 538. Dav. 322. 2 Bl Com 115. Do - 381. But a Devise in the same words "to A and his heirs male" will create a Fee Tail. because such the intention appears

176 Bl. 417 2 Bl Com 381. And by Devise a Fee Tail may be created without the word heirs - as to A and his posterity - in as common a Fee Tail was created by the intention of the Testator.

6 Coke 17 A 2 Bl Com 115. Dav. 30 & 40 1 Bulst 219 1 Vent 227. 34. 1 Ch Ca 4 56. Do - 460. As to the word Children in a Devise if a Devise be to A and his Children & he having at the time of making the Devise no Children A takes a Fee Tail. Tenancy is manifestly the intention of the Testator that the Children take in some way or other but they cant take as joint Tenants immediately because they are not "in esse" nor can they take in remainder as such would defeat by, not the intention of the Devisor.

6 Coke 16 B 17 B Ca Ch 143 1 Cas 262. But a Devise to A and his Children he at the time having Children they take immediately as joint Tenants for life. Reg at the with the Father.

Cro Jac 314. 1 Vent 114. In the above case happens only those Children "in esse." at the time of the Devise can take, to the exclusion of after born Children. for by this construction the Devise is defeated

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satisfied. and that would have been
used had the Devisee meant to extend it to
the future Children.

If a Devise be "to A and after his death
to his Children." he then having Children. 6 Coke 16 B
A takes an Estate for Life. and his Children Moore 397
an Estate for Life after him in remainder. Ch. Litt. 9 H
as purchasers. as the word "Children" in this 2 Vern. 345.
case evidently denotes. Doug. 300.

Here the after born Children will take
a Life Estate in remainder with those "in
ese" at the time. For in this case it obviously was not the intention of the Devisor to confer an immediate Estate to the
Children. & c. For in that case as we have
seen above the Children in esse only
could take but a remainder and this
not to any particular Child or Children
but to the family or posterity generally. —
This I take to be the Rule. (As owned) though
it is not very firmly established by Judicial
decisions. there being not in my knowledge Cowp. 36
more than one case in point to be found in 2d 314
the books which case is reported in Cowp. in point.

If then the Devise were "to A and after 6 Coke 17 A B
his death. to his Children" he then having no Moore 220
Children. the construction would be that Cowp. 314
all the Children would take a Life Estate in
remainder

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There is one case in "Anderson" contrary to the above Rule.

Doug. 413 in Compan.

Quere? Whether in this case A would not take an Estate Tail. — Under the Rule as laid down above. —

If an Estate be limited to A and the heirs female of his body the female sons will take an Estate Tail though there be a son and they cannot be divested upon the descendants of their sons as long as there is a son.

But if any other Estate be limited to the heirs female as Estate in the case the females will take Tail to the son. — The reason is not Law they will take as Tenants in common & Joint Tenants.

Jacob Rep. 1 Ves. Sr. 245 2 Br. Parl. Ca. 29 Hobart 29 1 Fern. 216 3 Lev. 336 2 Ld. Raym. 1 Gilb. Ca. 54 Fearne 32 Do 14 Nels. Rep. Title 1 Ves. Jr. 104 & 112 5 Burr. 2615 1 Fearne 422.

This Case has been three times solemnly argued in the Court of King's Bench and once decided in favour of the females and this decision seems to be liberal and right.

Thus far as to the manner of creating Estate Tail. —

Incidents of Estates Tail are

2 Bl. Com. 145 Do 116

1st Tenant in Tail is not liable for Waste.

2nd Alienations of Tenants in Tail is entitled to Dower.

3rd The Husband of Tenants in Tail is

Real Property

entitled to Estates

4th The Estate may be barred or the Entail docked by a Fine and Recovery or by Fine with warranty descending with assets to the heir in Tail — for Fine and Recovery see 2 Bl Com.

Estates Tail were first declared to be barred by Fine and Recovery in the reign of Edward 1st and forfeiture for Treason in Henry 8th

The Issue's right to suffer a Fine and Common Recovery is inalienable & is free from the Estate Tail a condition in restriction of this right is void.

In Conn. there is no such thing as suffering a Fine or a Common Recovery because we have a Statute which vests a Fee Simple in the immediate Issue of the first Donee. — This is like a Fee Conditional at Com Law — and such Entails are common in this State. —

Thus much of Freeholds of Inheritance

Freeholds not of Inheritance.

These are always Estates for Life or Lives. — and are either Conventional i.e. created by the Contract of the parties or Legal i.e. created by Operation of Law —

Conventional Estates may be for ones own Life or the Life of another or for

more

1 Inst. s. 224

2 Bl Com. 121 Epw 1 Ch. 47

2 Bl Com. s. 300.

2 Bl Com. s. 116. 17. 18.

4 Rep. 603-4

8 Rep. 61

Stat. Com. Ch. 43.

2 Bl Com. 120.

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more Estates than one.

2 Bl Com 120 Legal Estates for Life are always for the Life of the Tenant only.

Lev 74 & 56 An Estate "Pur auter vie" is an Estate for the Life of another.

Lev 74 & 85 2 Bl Com 104 2 Bl Com 120 Conventional Life Estates can be conveyed only by Livery of Seisin, because they are Freeholds.

1 Inst 42 2 Bl Com 121 A General Grant without any Limits of Life Estate always passes an Estate for Life to the Grantee. Because an Estate for the Grantees own Life, being ascertained, settled and more valuable than an Estate for the Life of another may, & will, take a Life Estate: & unless the Rule that Grants shall be construed most favourably for the Grantee

2 Bl Com 121 1 Inst 42 3 Coke 20 As Gen Rule. Any Estate expectant on Estates of Inheritance or for Life or Years not determinable during Life is a Life Estate. As a Grant to Aliens as long as they remain in the Kingdom, or to B during his widowhood.

2 Coke 48 1 Inst 132 1 Bl Com 121 1 Bl Com 132 There is a distinction between a Grant "to A for Life" and for "his natural Life" because he may be civilly or legally dead while naturally alive. as e.g. by entering into Religion &c. This has occasioned the usual Phraseology of Deeds —

Real Property.

Section 5th

The Incidents to Fee Estates are

1st The Tenant if not particularly restrained may take reasonable Estovers — 2 Bl Com 122 Do — 35. Co Litt 41 Do — 53.

2nd Tenant for Life is not to be injured by any sudden termination of his Estate which it may be by his own act. (i e) he or his representatives have a right to the Emblements. actus Dei nemini facit injuriam.

By Emblements are meant the profits or fruits of Land produced by annual labour, and not the wild and spontaneous production. 2 Bl Com 122. Contra 1 Com Dig 87.

So if the Tenant holds "pour autre vie" he has the emblements. The same is also the Rule when the Estate determines by operation of Law. actus Legis facit injuriam nemini. 5 Coke 116.

But if a Tenant by his own act forfeits his Estate before his Estate determines he shall not have the emblements. - as for waste - 1 Inst 55 2 Bl Com 123.

The under Tenants of Lessees have even greater indulgence because they come in the place of the Lessee, as he shall his forfeiture 6 Co Eliz 461 1 Roll Ab 727. 2 Bl Com 124

If an under Tenant for Life sets a Lease for 7 years and dies before the expiration of the Term, the Lease determines unless confirmed by the reversioner. But Tenant is good Lessee during the Life of the Lessee. Litt 57 a 510 Noy 103 3 Bac 397 Cowp 482 1 Inst 55 a 80.

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Legal Estates for Life.

Estates tail.

1st Tenant in Tail after Possibility of issue extinct.

2nd Tenant by the Curtesy of England.

3rd Tenant in Dower.

The first of these Estates arises where a Person to whom Land is devised in Tail dies without issue or is attainted without Possibility of issue & the inheritance being descended or devised for want of issue. - Thus if Lord Thos of his body by his wife B. Bries without issue. Lord A remains Tenant in Tail for life by the Curtesy.

Litt. Sect. 32
2 Bl. Com. 124

2 Bl. Com. 125.

These Estates cannot be conveyed directly by Grant. - In case of a Disposed & unmarried the parties can take only an Estate for life because they can have no issue such can inherit.

Litt. Sect. 34
6 Litt. 28

The Tenant also supposes a Possibility of issue until the death of the other party.

1 Inst. 28
2 Bl. Com. 125

This Estate is of a mixed nature partaking partly of the nature of an Estate Tail and partly of an Estate for life. - By the former law as much as the Tenant can commit waste or at least is not punishable for doing so. he commits waste by cutting timber-

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tinuance is not this Estate 2 Bl Com 240
first Seisin thereof or who has the next
immediate Estate of Inheritance —
and it means an Estate for Life in being
forfeitable by Granting a Fee simple &c
(i e) an Estate greater than his own —

Tenant in Tail after Possibility
of Issue extinct is generally regarded as 2 Bl Com 125
Tenant for Life and may make an exchan- 2 Bl Com 323
ge of Estates with a Tenant for Life &c —

2nd The second Species of Legal Estates for
Life is that by Curtesy of England —
When is it? when one marries a Woman seised Litt Sect 35
of an Estate of Inheritance and has Issue on Litt Sect 52
alive by her and capable of inheriting — Thus
he supposing his Wife is Tenant by the Curtesy
Issue is indeed all one must serve to create this Estate 2 Bl Com 127
1st Marriage 2nd Seisin of the Wife 3rd Issue
4th The Death of the Wife —
The Marriage must be a Legal one —
Issue must be an actual Seisin in the Wife
at the time of her Death and must be a le- Co Litt 41 a 40
gal right to do so & Seisin for it must be such Co Litt 41 a 29
Seisin as the Issue could inherit —
A mere constructive Seisin thus serve will
not entitle the Husband to Curtesy

Real Property

It has been held by the Supreme Court of Errors in Conn. that an actual seisin of the Wife is not now necessary to constitute a seisin which will entitle the Husband to curtesy because by the Statute of Conn. an Estate in Fee Simple vests in the Husband by the Marriage.

2 Bl Com. 127
1 Fitz. 29.

At Common Law the Husband is not entitled to a Reversion or Remainder, but if the Wife has not had Issue born alive.

If the Wife were an Idiot the Husband cannot take by curtesy. Because the Wife being "non compos" could not be legally married and therefore has no Husband in Law.

Rawle 263.
Co. Litt. 30
2 Bl Com. 127
2 Bl Com. 130.

The Issue must be born alive.

Because if still born it is incapable of inheriting and where the Issue cannot inherit the Husband cant take by Curtesy.

Litt. Sec. 1850
Dyer - 25
8 Coke 34

The Issue must be born during the Life of the Wife. - Thus if the Issue be taken from the Wife by the Caesarean operation after she is actually dead the same thing as tho she had lived the Husband cant have Curtesy in her Estate. Because

Co. Litt. 29
2 Bl Com. 128

Real Property

because it cannot be said that the Issue by the during Coverture.

The Issue must be actually existing. Hence if the Wife's Estate be given in Tail male and she have none but female Issue she can not take by Curtesy

The probable reason of allowing the Husband Curtesy is that the having the Education of the Children now under his care he ought not to be deprived the means of defraying the expences of their Education &c

6 Co Litt 29
2 Bl Com 128.

It matters not when the Issue is born. It is to be during Coverture. Whether it be before or after Seisin. and whether it be dead or alive at the time of Seisin is not material. and whether it be dead or alive at the death of the wife is also immaterial in either case the Husband will take.

6 Co Litt 29.

The Husband is entitled to an Estate by Curtesy in the Wife's Equity of Redemption

1 Atk 603,
Ld Mont 112.

By birth of Issue the Husband is Tenant "initiate" but his right is not consummate till his Wife's Death

2 Bl Com 128
6 Co Litt 30.

The last species of Life Estates by Law is Tenancy in Dower.

Real Property

Dower

2 Bl. Com. 132 Tenancy in Dower is when the Husband of a woman seized of an Estate of Inheritance dies. The wife is entitled to a Life Estate in one third part of all the Lands and Tenements whereof he was seized at any time during Coverture.

2 Bl. Com. 130 She must have been the actual Wife of the Husband at his death. "If they are divorced a vinculo matrimonii" She is not entitled to Dower. But a Divorce "a mensa et thoro" does

2 Bl. Com. 130. not bar her right of Dower. Cause in the Eye of the Law they still remain Man and Wife.

6 Co. 31 If the Husband were an Idiot

2 Bl. Com. 130 the wife has no Dower.

2 Bl. Com. 130 By the ancient Com. Law a Murderer

2 Bl. Com. 131 and had no Dower in the Estate of the Husband who had been guilty of Treason or Felony. - but by Statute 1 Edward 6 the shall forfeit her Dower for his Felony.

Const. U.S. art. 3. sec. 3 In this State, and indeed in the United States Treason or Felony works a forfeiture no longer than during the Life of the Criminal. The wife is but then not barred of Dower by the Husband Treason or Felony.

Real Property.

An Alien can be endowed except by Special Statute. because an Alien cant hold real property. The Law of England and of Court is the same on this subject. — 2 Bl Com s 131 / 1 Inst s 31.

A widow under nine years of age cant be endowed. — 2 Bl Com s 134

To entitle the widow to Dower the Estate must be such as that any issue which she might have had, might by possibility have inherited. — 2 Mc 74 1836. / Do 53 / 2 Bl Com s 131.

A Seisin in Law. i.e. a right of present possession of the Freehold is sufficient to give Dower without actual Seisin. — But as we have above seen. to entitle the Husband to Curtesy actual Seisin is necessary. — 1 Inst s 31 / Cro Eliz 503 / 2 Bl Com s 131.

The reason of the distinction in the two cases. seems to be that in the latter case the Husband has it in his power at any time he pleases to reduce his legal or constructive Seisin in the wife to an actual one. but in the former case the wife has not this power. — and otherwise the Husband has it in his power by neglecting to take actual Seisin. to cut off the Dower in such property.

Real Property.

Remainder &c. in Co Litt 313. Noy - 64

It is sufficient that the Husband have had Seisin for any period of time however short to entitle his wife to Dower.

Co Litt 31 Co Ja 615 2 Co 57 2 Bl Com 132

But since the Estate is merely "in transitu" and only passes through the Husband as a vehicle to vest in the wife this is not Seisin to entitle to Dower.

At Com Law though the Husband alienes the Land during coverture she has nevertheless her right of Dower in such Land.

But under our Statute the wife is entitled only to one third part of the Lands the Husband died Seised of in Fee

St of Con 239

At Com Law the Wife has not Dower in the Husbands Equity of Redemption because this is a mixed Trust Estate.

Pow Mod 321. Do 323. 1 Atk 606. 1 Bl Rep 138 1 Bl Rep 101. 2 Atk 323. 1 Br C C 326. 3 P Wm 229 Talbot 136. 2 P Wm 700. Sug Vend 137 Pow Mod 340 2 Fonb 402. Rud C 127 133.

Yet the Husband has entire in his Equity of Redemption - This Law is wholly arbitrary, and unauthorized says Gould. The distinction is wholly without reason or Justice. Yet no Chancellor has yet had sufficient fortitude to overturn this Rule.

In Conn the wife is entitled to Dower in the Husbands Equity of Redemption

Real Property

Lecture 6th

At Common Law the Dower must be assigned to the Widow before it can vest in her for she does not take of course upon the Death of her Husband – Neither the Law at Law immediately on the Death of the Husband or Father becomes Heir of the whole Estate. Dower is to be assigned by the Heir or if he be a minor by his Guardian. The Widow is Heir in the nature of an undertenant to the Heir —

1 Inst 34-5
2 Bl Com 135-6

In Curtesy the Husband takes the whole of course, the Heir not being seized until the death of the Husband.

In Dower however the Widow is not dependent solely on the will of the Heir. If he does not assign or make it to her by title the Law will compel a just assignment — This is Common Law.

Authorities Infra

Generally in Court of the Court of Probate will do what there is a proper assignment. Vide 4th of Court 240.

4 Com Dig 240.

Forfeiture of Dower. The right of Dower is forfeited in several ways —

1st By the wife's Elopement and living in adultery. unless the Husband become afterward reconciled to her. This by St of Westminster 2nd

Real Property

So also by a total Divorce a vinculo matrimonii.

Also if the Wife is an Alien she cannot be Dowerable by Special Statutes either in England or Conn.

Dower is also forfeited by the Husband or Treason. actually Felony or petit a forfeiture but not by Statute of Henry 6th it does not.

The Wife may bar her Dower by a fine or Common Recovery in New York and Massachusetts joining in a deed with her Husband bars her of her Dower. but not at Common Law. ——

Releasing the Title Deeds from the Heir bars her of her Dower unless she delivers up them up.

1 Rob. 34
2 Bl Com 135
2 Bl Com 137

By Statute of Gloucester by alienating in fee right of Dower is forfeited. ——

4 Bl Com 239

In Conn the Wife does not forfeit her right of Dower by a total Divorce unless she were the faulty party ——
Hence as a Gen. Rule if she sued for the Divorce she does not bare her Dower but if the Husband obtained it she can bar it. Except in that case it is presumed the faulty cause

Real Property.

Not in Const. does the Wife forfeit her Dower by her Husbands Treason. —— Cons USA Sec 3 art 3.

Lastly. The Wife may have as ample a Dower as in England for herself & her children & properly arises a Jointure — but if such Jointure would want any of the requisites necessary to make a constitutional Jointure she is not barred of her Dower. ——

It has been a Question in Const. whether the Wife can take a Jointure in personal Property — It has recently been decided that she cannot. —— 2 Com 137-9

Estates less than Freehold are of three Kinds.

1st Estates for Years
2nd Estates at Will.
3rd Estates by Sufferance.

An Estate for Years is an Estate in Land Tenements or Hereditaments for a determinate Period of Time, as 10. 20. or 40 Years &c

The Party does not pay any Rent of Time of Est which appear in the distinction of Estates (i e) in the classification of Estates it does not make a distinct Class of such as are Litt Sec 58. Litt Sec 80. 2 Bl Com 140.

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for life has a year as 1, 4 or 10 months Term may be included in the general Division of Estates for Years. This Estate in Law is the lowest order of determinable Estates.

By a Year in Law is meant a Calendar or Solar Year. But by a Month is understood a Lunar not Solar or Calendar month.

6 Co. Litt. 61
2 Bl. Com. 141

By the term a Twelvemonth is always understood a full Calendar Year because such is the common understanding of the Word. A Fortnight means only 14 Days.

1 Inst. 135
2 Bl. Com. 141.

In Grants the Law takes no notice of fractions of a Day.

A Lease for a Year made in the middle of the 1st Day of November 1811. will determine on the 31st of October 1812

Every Estate which must of its own nature have a certain beginning and a certain end.

1 Inst. 46.
2 Bl. Com. 143

He commences at the delivery of the Deed. It is a maxim of Law that "Id certum est quod certum reddi potest."

5 Coke 35.
2 Bl. Com. 143.

Hence a Lease for as many years as the Lessee shall name is good, enabled by this maxim. What may be made certain.

Real Property.

But a Lease for 20 yrs. "I shall die" is void for uncertainty. and conveys no Estate. it cannot convey a freehold & an Estate "pur autre vie" because there is no Livery of Seisin. 1 Inst 45.

A Lease "for 20 yrs if John Stiles shall so long live" — is good because certain. it cannot extend further than 20 years. It is a mere determinable Lease 2 Bl Com 143 1 Inst 45.

An Estate for 99 years is a mere personal Chattel so that not even a freehold Livery of Seisin is not necessary to create that Estate. — And hence the personal property goes to the Executor &c and not to the Heir at Law. Co Litt 46.

Where an Estate for 99 years may be cut to commence "in futuro" — 5 Co Rep 94 2 Bl Com 143.
But an Estate for Life cannot commence 2 Bl Com 144
Livery of Seisin is necessary. and if it be by Deed which creates the freehold which vests the Estate "in præsenti" only.

Where things common it is not 6 Co Litt 46
correct & proper to say that one is seised 6 Co Litt 144
of a Term. but rather "possessed" of it. for Seisin is the "Possession" of the Freehold itself. — Term now means the Estate and not merely the duration of the Estate &c.

Real Property

Incidents of Estates for Years &c.

2 Bl Com 35. Do 122 Do 144

1st Tenant for years is entitled to the same Estovers as Tenants for Life

2nd Emblements. If the Estate extends but to a certain limited period he shall not have the emblements after its expiration because he knew & when it would determine &c

1 Inst 56. Litt 68. 2 Bl Com 145.

But if the Estate be defeasible upon a contingency which happens before the end of the period to which it is limited - as to A for 20 years if B so long and B dies before the 20 years expire his Executors shall have the Emblements

But if the Lease is determined by his own act the Tenant has not the Emblements

Lecture 7th

Estates at Will

2 Bl Com 145. Litt 68. Co Litt 55. 2 Kay 707. 2 Kay 1008.

Where an Estate is given at will the Lessee is entitled to hold & occupy the premises during the joint will of the Lessor & Lessee but not for any determinate time or term.

Real Property.

The Rule as to regard to Emblements in this Estate is generally that where the Lessor determines the Estate between sowing and harvest the Lessee shall have them, but it is to be determined by the Lessees own act he shall not lose the Emblements. —

This Estate may be determined by the express determination of the Lessor. but this determination must be made on the Land or notice thereof be given to the Lessee.

The Lessor executing any act of ownership is an implied determination of the Estate as entering and cutting wood &c

The Estate is also determined by the Lessor, making a Feoffment or fine Sur cognizance of the Use to commence immediately

By the Lessee assigning his Estate or Interest to "strangers" determines his Estate — So if he commit Waste all act of his is inconsistent with the nature of the Estate, or his duty. —

Finally this Estate may be determined by the Death or Outlawry of either of the parties. - Outlawry is a civil Death

1 Inst^{s} 55 b
2 Bl Com^{s} 140
Litt Sec 68 a
5 Rep^{s} 116 a

1 Vent^{s} 248.
& Authorities cited

1 Inst^{s} 57
1 Rolle 860
2 Levins 88.

2 Bl Com^{s} 146.
1 Inst^{s} 57 a.

1 Inst^{s} 52
55 — 62
5 Coke 116.

Real Property.

If Rent be payable quarterly, semi annually or annually and the Lessee determines the term before the expiration of the current year, half year or quarter he must pay to the end of such current term.

1 Salk. 414

1 Sidney 339

2 Bl. Com. 147.

But if the Estate be determined by the Lessor he shall be bound only to the end of the last complete Term.

I have treated this subject as if it was a Gen. Occupancy and as treated of in Blackstone and other Estate tho' given Estates at Will I have been considered as Tenancies from year to year.

2 Bl. Com. 147.
3 Burr. 1609
Eq. Dig. 450.
2 Atk. Rep. 173
8 Vin. Abr. 3.
17 Vin. Abr. 159
D°. — 183
2 Bl. Ch. R. 101
27 Vin. Abr. 430.
43 Vin. Abr. 361
7 D°. 84. 85.
8 D°. — 3.

The difference is immaterial. — Estates at Will may be determined at any time. — But Tenancies from year to year can be determined only at the end of the year and then not without reasonable notice usually six Months.

This consideration of Estates from year to year is most reasonable to allow the Tenant the advantage of every Season of the year. Some of which are more and some less profitable for productive Soil.

Now a Lease for no determinate term is construed to be a Tenancy from year to year. This idea has been introduced as in Blackstone remote.

Real Property.

If many either of the Parties die the Estate does not of course determine but the usual notice must be given by or to the heirs, or Executors of the deceased Party. — 2 Rep 15 a
3 Wilson 25.

And this in England extends to Grants or Conveyances for Freeholds. — 1 Bac. Abg. Tit. Leases & Terms for years page 72 Tit. G
There Parol Leases for more than three years by the Statute are Tenancies from Year to Year. 8 Rep 73 a
5 Rep 1 a 47 b

But in Country no Parol Lease is valid — it only a License to enter. — 1 Salk 6 b 354

Estates at Will can now hardly be said to exist in England. All Grants thereby there can be none according to the English Law. because they are suspended by Tenancies from Year to Year. — 3 Burr 1609
Esp. Dig. 416.

Notice given to quit at any time except at the end of the year therefore is not good. — 1 Rep 15 a

But if notice be given generally by the Landlord to quit without mentioning the time, the Law will determine it for the end of the year. — 1 Rep 15 a

But if after such notice to quit at the end of the year the Lessee retains Rent which accrued after the end of the year the Lease is good for another year. — 6 Rep 1 a 2 b
1 Black 311

Real Property.

2 Bac Ab 101. If notice is not given for the Year next before it given it is void for the next or any subsequent Year for it was given only for one Year.

2 Bac Ab 101. But Tenant's Notice can't be defeated by the Tenant denying the Landlord for he denies that the Landlord ever had to give notice he may be quit without it for Tenancy determination is always end.

1 Bac Com 135. If a Lease be granted for a Year another
Do. 258. determinate time, and the Lessee continues
1 Rol Ab 102. in Possession over with the consent of the Landlord this Lease is good for another year (i.e.) Proper notice must be given again as before.

Estates at Sufferance.

2 Bac Com 150. Where one enters with the Tenant comes
1 Inst 57. into Possession of Land by lawful Title and holds over without Title or leave.

27 Hen 8 159. Formerly a Tenant after his Landlord
37 Hen 8 25. death held by Sufferance, but now he is Tenant for Year.

2 Bac Com 150. A Tenancy at Sufferance may be determined at any time by the entrance of the Lessor. But the Tenant

cont.

Real Property.

cant be sued as a Disseisor before entry made by the Lessor — & cant have come into possession rightfully but is presumed to continue rightfully, until by some subsequent act of his Landlord his Estate is declared at an end. — after entry the Tenant is considered as a Disseisor. —— 1 Inst. 57.

To support an Ejectment in England this entry must be formal, actual entry — 2 Bl Com. 151. 5 Mod. 384.

But in Cont. this formal actual entry is not necessary, to support an Ejectment, in Pennsylvania it is that a Tenant at Sufferance cant exist here for the Tenant is treated like a wrong doer, or tort feasor. —

And now in England this Estate is rarely destroyed by a Statute which has not recently passed —

Lecture 8th

Estates upon Condition

An Estate upon condition is one depending upon some uncertain event by which it may be created enlarged or defeated. — 1 Inst. 201. 2 Bl Com. 152.

And are two kinds of conditions Expressed & Implied

Real Property.

Conditions are Expressed or Implied. —
A condition Implied is one arising out of
the nature of the Estate itself. —
Litt. s. 371 & 378) An Estate subject to a Condition Expressed is
Co. Litt. 201-b, 215 one to which there is annexed a proviso
2 Bl. Com. 154 qualifying the Estate as to the time of
Vesting or Divesting it. —

Implied Conditions are always subsequent.
Expressed Conditions may be either
Precedent or Subsequent. —

Litt. s. 325. A Precedent Condition is one which must
1 Saund. 217 be performed before the Estate can vest. —
2 Bl. Com. 154 A Subsequent condition is one by which
an Estate already vested may be defeated —
such are usually conditional at Common Law. —

There is a distinction between an
Expressed Condition in Deed and a Limitation
called a Condition in Law. — The
Litt. s. 380 words usually — Provided — Upon
37 Hen. 8. 11 condition — and the like
2 Bl. Com. 155. But these words "upon condition" do not
37 Hen. 8. 11 "provided" &c. are words of condition in Deed as
contradistinguished from words of Limitation.
The difference of these Estates is similar
& the word is a Limitation. the Estate vests
is immediately on the happening of the con-

tingency

Real Property.

contingency "into facto" and of course.
The Estate is then not voidable merely but void
But if the grant is a Condition the Law
permits the Estate to continue beyond the
condition unless taken advantage of by the
reversioner. & remainder man. Therefore
the Estate is not void but voidable only,
on the happening of the contingency. The
reversioner may take advantage of it in the
proper Court if he does not the Estate continues

To this Rule there is however
one exception viz — If on the breach of the
condition the Estate is to go over to a third
person then the grant is construed a limi-
tation and on the breach of the condi-
tion the Estate shall "into facto" cease
and go immediately to the reversioner re-
mainder man whether the Landlord chose
or not otherwise the third person would be
remediless.

If a Lease contain a clause
authorising the Lessor to reenter on non payment
of rent, & an actual entry is not necessary
to sustain an action of Ejectment, a fictitious
entry is sufficient for that purpose because
by Law the Lessee is obliged before the com-
mencement to search. Entry, Lamb. Case.

Litt. Sect. 347
2 Co. 155.
1 Inst. 214.

1 Inst. 202
1 Rol. Abr. 411
6 Eliz. 265.

Dany. 480
Ld Ray. 750
Salk. 259

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It was formerly thought that a condition in a Lease that the Lessee should not assign his Term was void as repugnant, but now such a Condition is held to be good and is now established by Law and it is most reasonable surely that a man should be sole Master of his own. Thereon an assignment by the Tenant is a forfeiture of his Term.

2 Atk. 210
2 Bac. Abr. 708
2 Ves. 138
8 Rep. 57. 60. 61.
+ Hob. 170
+ Wms. 2 Vent. 6
+ Cro. 2 Ro.
+ 2 Saund. 9. 10.

A Lease to A on condition that his Executors or Administrators shall assign is good and binding.

2 Ves. 140
2 Rep. 425.

A Condition in a Lease that if the Lessee become Bankrupt the Lessor may retake the Estate is good.

Also a Condition that the Term shall not go to pay the Debts of the Lessee is good for that is an assignment and of course forfeits the Term.

2 Ves. 133
6 Rep. 684
8 Rep. 61.
2 Atk. 217

When one holds an Estate for Life or a Term with condition that he shall not assign it. Even a mere ineffectual attempt to assign it will forfeit his Term. But where his Deed of assignment proves to be defective or insufficient I have not been informed any thing done to the Lessor

5 Rep. 44
6 Rep. 41.

Real Property.

If an Estate subsequent condition be impossible the condition is void and the Estate is good. — So also if such subsequent condition become impossible by the contract or agreement the Estate is the same the condition is void and the Estate is absolute. So also if it be made impossible by the Grantors own act. For the Law does not require impossibilities. — Actus Dei nemini facit injuriam. Where there impossibilities be by the act of the party or the act of God. — 1 Fonb. s. 201 / 1 Fonb. s. 205 / 1 Fonb. s. 217. / 1 Powell on Con. 261 / 1 Powell on Con. 262. / 2 Bl. Com. s. 157

Finally if the Condition be against Law, or inconsistent with the nature of the Estate. Such subsequent condition is absolutely void and the Estate becomes absolute. — 2 Cruise, 7.

Condition Precedent; which are impossible or unlawfully, are in themselves void, and never vest the Estate, for no man can acquire a Right by an unlawfull act, or be benefited by his own wrong. — 1 Fonb. s. 206.

The performance of Conditions is what is called matter in Fact, being a thing which may be done by Law, and is no contradiction of pleading. — Barnardiston 90. / Pole Mor. s. 54

Mortgages

Real Property

Mortgages

Estates Landed in Pledge come under Considerations Subsequent ——— ——— ———

A Mortgage is an Estate granted by a Debtor to a Creditor upon Condition that the Debtor shall on a certain day pay the Debt the Debtor may recover or that in that event the Creditor shall reconvey or to vary the Phraseology the Grant shall then become void. ——

The Grantor in the Law is called the Mortgagor and the Grantee the Mortgagee.

Powell is guilty of a Solecism when he says that Mortgages are of two kinds "Viz" "Vivum Vadium" and "Mortuum Vadium."

Dan. Mort. 3-4. Pledges to be sure are of two kinds "Viz" — dead and living but the former only is a Mortg.

Dan. Mort. 4. 1 Mk. Dig. 332. 1 Fitz. 205. 2 Bl. Com. 157 8.

It is usual on the performance of the conditions for the Mortgagee to reconvey — but this is not necessary, for the Mortgagor may maintain an action of Ejectment against the Mortgagee. But a reconveyance is the safest and most summary method for the Mortgagee. for otherwise the legal title is independently in the Mortgagee and then for the defence of the Land the Mortgagor must depend —

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depend upon facts & proof. — Mortgages.—

A Mortgage is called a dead pledge as contradistinguished from a living one because if the Mortgagor fails to perform the conditions the Estate becomes absolute and the Mortgagee may enter upon it, and take possession without any possibility at Law of being afterward evicted by the Mortgagor to whom the Land is now forever dead. — Cro. Eliz. 413 Do — 108.

A Mortgage then is an Estate pledged by a Debtor for the security of his Creditors demands. and the term "Mortgage" properly means the thing put in pledge. as the Land and not (as is commonly supposed) the instrument by which it is held 2 Bl. Com. 158. Cro. Eliz. 447 Do 450 13 Ves. Jr. 56.

The Condition of a Mortgage deed is called a Defeasance. and it may either be incorporated with the deed, annexed to it, or a distinct and separate instrument, bearing on the Deed and referring to it. —

The latter as between the parties, answers the same purpose. as if absorbed in or incorporated with the instrument — for being executed at one and the same time it is in fact but one disposition. Cro. Eliz. 57.

But as between strangers it may be different for one not knowing of the Mortgage may purchase of the Mortgagor

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who from the Deed is subjected to the Lease and that determines the Mortgagor's Estate.

There is a distinction also between Conveyances between a Grant made to secure a mere Gift or Gratuity, and a Grant to secure an antecedent debt &c. In the latter case tender on the day discharges the Mortgagees lien. But not the Debt, for this remains good. But unsatisfied in the former case the legal title is not only vested in the Mortgagee by the tender but the duty which was before incumbent on him is discharged.

Cro Eliz 245.
Pow. Mort. 5.
Do — 454
Litt. Sect. 333-8
9 Coke 77.
1 Inst. 207.a
Do — 209.a.b

The Condition of a Mortgage Deed was formerly considered as a condition Precedent. But it is now universally considered as a Condition Subsequent.

Cro Jac. 427.
Pow. Mort. 17
1 Coke 22
1 Ves. 205. 6. 332.

Formerly if a Mortgage in Fee was forfeited so that the Estate became absolute in the Mortgagee. This Equity was permitted to have the Power in it. To remedy this inconvenience it became usual to grant only a long term of Years by way of Mortgage with Condition to be void on payment of the Mortgage money. And it remained thus in England to this day. In Connecticut this custom to mortgage in Fee for the sum settled that the Mortgagees Wife has no Power in the Mortgage.

Pow. Mort. 17
2 Bl. Com. 158.
3 Bac. 632
18 Ch. R. 311
Cro Car. 191

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If a Land is given by the Mortgagor conditioned for the performance of the Mortgagee Deed. (ex. of the condition of this deed) non-payment amounts to a breach of the condition of the Land and thereupon it is forfeited.

6 Co. Jas 287. Yelverton 206 2 Lewins 116. 3 Keble 387 Ps. Mag. 10. 12.

At Com. Law if the Defeasance annexed to the Deed was not strictly performed the Estate vested absolutely in the Mortgagee.

But in England to remedy this Evil Chancery has interposed, and after non-performance of the condition the Mortgagor as the owner of the Land considering the Debt as the principle and the Mortgage as the accident.

Thus in this case the two Courts acted in direct opposition to each other; But in the reign of James 1st the dispute was settled in the favour of Chancery. So that now if the Debt is paid though after the Estate at Law has become absolute in the Mortgagee, the Mortgagor may redeem. - Unless a Sale has been made by the Mortgagee to the Trustee.

Norman on Mortg. 575. Pow. Mag. 5. 14. 109. 178.

This equitable right to redeem after the day of payment has past is called the "Equity of Redemption." The right of redemption is a Court of Equity. Though in common parlance we call it the right to redeem both before and after the day of payment

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The Equity of Redemption — Right in Strictness this equitable right does not commence till after the day of payment has elapsed even tho' incident to the right of redemption is a legal one and may be enforced at Law. —

Till the Condition is actually made the Mortgagees interest continues even in Equity and he is entitled to the rents and profits. For which however he is liable to account.

So if A makes a family settlement and then mortgages the Estate the Settlement is not impeached any more than is absolutely necessary from the nature of the Mortgage and the person in whom the Settlement is made may redeem. for the Mortgage is only "pour autre"

So also if a Devise of Land is made by A to B. and A afterwards mortgages the Land to C it is a revocation pour autre mandy and the Devise may redeem —

A Sale or alienation would completely defeat the Devise or Grant.

But if the Land is devised by B to A — and the owner afterwards mortgages the same Land to the same person. this is a total revocation of the Devise for then the legal Estate created by the Mortgage merges the equitable one created by the Devise. for they are incon-

vertible

Pau. Mog. 35
Do 299.

g. Modus 196.
Pau. Mog. 15.

Pau. Dig. 594.
618.
Pau. Mod. 15. 17
Do 322. 328.
1 Vern. 282
Do 322. 342
2 Vern. 549
Salk. 568.
3 Mod. 178.
1 Do 180.
Pau. Dig. 514
Co. James. 49
Pau. Mog. 17. 18.
3 Vern. 417
Do 600.

incompatible with each other and cant exist at the same time in the same person. 5 Day 650.

Whatever is the form of the conveyance if it is intended to secure a Debt & not to dispose of the Estate it is a Mortgage. and every contract for the loan of Money or the payment of a Debt and in which Land is pledged is in Equity a Mortgage. 2 Ves. Sen. 495.

It is a Maxim in Law that "What is once a Mortgage is always a Mortgage" by this is meant that all private agreements or covenants between the parties at the time of making the Mortgage to prevent a redemption are void. 17 Ves. 33. 1902. 27 Beav. 304. Fon. Eq. Bk. 1. ch. 2. § 1. x 28. 38. 39. x

This Rule is made for the protection of the Mortgagor. to shut him from the oppression of the Mortgagee the Mortgagor usually being in necessitous circumstances and is immediately whether the contract is contained in the same instrument or one separate from it. 17 Ves. 84. Comyns Rep. 603.

That an agreement at the time that if the Mortgagor did not redeem within a limited time he should forever forfeit his Mortgage is void.

So an agreement that on failure of payment the Mortgage should be considered an alienation. provided the Mortgagee paid 17 Ves. 138. — D°. — 488. 27 Ves. 520.

on

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an additional sum of money is void. —

This is to prevent the Mortgagee from speculating on the necessities of the Mortgagor.

Section 2nd — To this Rule there are two exceptions viz —

Parr. Mg. 286. 287. 28, 6p. R. 599. — An agreement at the time of making of the Mortgage that the Mortgagee shall have the right of buying up the Equity of Redemption provided that it shall be sold and he will give as much as any other purchaser is good

1 Vern. 364. 26, 6p. R. 595. 1 Vern. r. 193. 214. 232. — Again in cases of family settlements where there is a benefit on Marriage next to be considered on the Mortgage there is an exception "as where a Mortgage is made to A. redeemable only during the Mortgagors life. was holden not redeemable after the death of A. by his heirs &c —

Further it may be added that a subsequent agreement for the sale of the Equity of Redemption fairly executed by the Parties is good for there is no danger of undue advantage to be taken of the Mortgagor for he has now got his money and is under no necessity of making such an Agreement. &c — But if such subsequent agreement was that the Mortgagor should sell his right of redemption on the continuance

1 Vern. 268. Talbot. 61. 1 Ch. Ca. 595. 1 Ch. Rep. 64. 149.

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performance of certain conditions by the Mortgagee if those conditions are not fully complied with the agreement to become void.

It is said an absolute Deed may be considered and treated as a Mortgage in a Ct of Equity in spite of expressions to the contrary & parol evidence being admissible for the purpose of showing that there shall be no danger of paying &c. As where A makes an absolute Deed to B. and at the same time executes his note for the same consideration continues in possession — pays the taxes — receives the rents and profits &c. and never accounts for what he pays in taxes &c &c — these circumstances are inconsistent with an absolute Sale and go to show it to be a Mortgage. and thus facts may also be proved without danger of perjury.

This principle can also be found in this State. and the Court of Errors reversed the judgment of the Supreme Court and said this Deed was a Mortgage &c —

This principle is recognized by many American writers. and may be considered as law though there are no judicial decisions to this point.

The payments of the Money due by the Mortgagor may be proved by parol. for as the Mortgagee can be compelled to give a receipt in writing. the Mortgagor would not otherwise be able to prove payments. and

2 Ves 6 by 320.
Talb Eq 60
3 Woodison 429
2 Mod 71
Ford Mg 65.

Barnard 70
P. Mg 53-6

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and a tender would be of no avail to him. — So also if the Mortgagee has forgiven the Debt & may be pleaded by Trust. —

1 Vern. 251 / 2 Ch. Ca. 57 — But parol evidence can't be admitted to prove an agreement between two Co-Mortgagors to change the Land of one of them and other than it would have been settled by operation of Equity upon the Contract. —

Land is bound by Trusts and Powers, but not by Debts, &c. —

Pas. Ch. 394. 2 Vern. 310. Pas. Eq. Mas. 104. 116. — Land is bound by Trusts and Powers to raise money to pay Debts &c. if the rents and profits are insufficient, & Trustees may Mortgage or Sell the Land. —

But if it is expressly said in the Deed that the Money shall be raised out of the rents and profits, the Trustees can't mortgage. —

Hist. Jur. of the general nature of Mortgages.

Interest of the Mortgagee.

As soon as

2 Ch. Ca. 158. R. Eq. Ca. 80-80. the Estate is created for the security of the Mortgage Debt, the Mortgagee is entitled to the immediate Profits in the Mortgaged Land, he may enter. —

Eq. Ca. Ab. 327-9. R. Eq. Ca. 68-7. — If it is agreed that the Mortgagor shall continue in possession, until the time of payment, or for any other determined period, he is tenant for years to the Mortgagee. —

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But when the Mortgagee is left in possession. for no determinate time he is then considd a Tenant at Will. for mutual benefit the right of Possession. — And though the Mortgagor has the inheritance & the Mortgagee but a Chattle interest. the former is Tenant at Will as to the possession but as to his quantity of interest the latter by the intendment of —

Before the Courts of Law recognized the Equity of Redemption a Mortgagee was considd as Tenant at Will and in Equity as the owner of the Land. —

But though as a Tenant at Will the Mortgagor may be ejected by the Mortgagee without notice yet he is not Tenant at Will for all purposes, nor even for most purposes — he is not liable to pay rents — nor is he entitled to the Emblements if evicted by the Mortgagee

A common Tenant at Will cant have another Tenant under him. (i e) he cant make a Lease of his interest. — But the Mortgagor in possession may make a Lease of the mortgaged Estate to be valid unless the Mortgagee is disposed to defeat it. (i e) he doesnt owe a common Tenant at Will. "Jure Jacto."

3 Eq. Ca. Ab. 444
6 Ch. Ca. 302. 66
Doug. 21 n.
R. Mg. 66. 84.

6 Ch. Ca. 600
Doug. 22
Forrest & Hard. Exch.
R. Mg. 68.

6 Ch. Ca. 303
1 Mk. 600.
R. Mg. 67-8-74

Doug. 22

R. Mg. 74-5
3 Eq. Ab. 444
Doug. 22
6 Ch. Ca. 566.
R. Mg. 68-80.
6 Ch. Ca. 303-5

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forfeit his Estate by leasing &c. —

If the Mortgagor has power to defeat the Lease and he may sue either upon the renewal or at his own he may at his election treat him as a trespasser and eject him. —

The under Tenants or Mortgagors Lessee has the same interests as the Mortgagor with respect to the Mortgagee and is entitled to the Emblements &c.

If the Mortgagee receives him as his
Doug. 266. own Tenant he must after due demand
1 Atk. 606. of him all the rents in arrear both before
Dow & My. 88 and after the notice though he can't compel
80. 87. him to pay to him what has been already
paid to the Mortgagor. —

The Mortgagor when
1 Ves Sr. 76 sued in Ejectment can't allege a Title in a
2 Eq. Ca. Abr. 480 Stranger for he is prohibited from saying this by
Pl. Mor. 469. his own deed. — The rule is the same between
1 Vern. 258. the Mortgagor and his Lessee. —

The Title of the Mortgagor Lessee is
good against the Mortgagor and all others
except the Mortgagee and his representatives.

If when after the Mortgagor has made a
6 Mod. 304 Lease he should remain in possession and the
1 Ld. Ca. Ch. 59. Lessee should sue in Ejectment he can't say
Pl. Mor. 175. that the legal Title is in the Mortgagee as he
is estopped from doing this. —

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The Mortgagor or his Lessee may maintain an action of Trespass against any wrong doer save the mortgagee for Waste. And the Lessee may recover the Land out of the hands of the Mortgagee — So far of the Mortgagors right of possession

Interest of the Mortgagor.

The Mortgagor is deemed for every purpose in Equity and for many purposes in Law to be the real owner of the Land or Estate Mortgaged and the right of the Mortgagee is considered to be a mere chattel interest — though nominally he has the real Title the freehold remains in the Mortgagor — Hence the latter by regaining possession acquires a Settlement But the Mortgagee by remaining in possession cannot acquire a Settlement. Again on Redemption will qualify the Mortgagor for a Vote. —

Dougl 610
Pow. Mg. 107
Vern 364
2 Burr. 978.
3 P. Wms 341
2 Vern 67
2 Atk. 294
Doug. 94

Hence the Mortgagors interest descends to his heir equally with the chattels in heritance and will pass in a Devise of any of the real Estate under the terms Lands Tenements or Hereditaments or under a general Devise of "all our real Estate" Upon the same principle the Mortgagor may

Fearne 15.76.
92. 113. 134

1 Atk. 603
Fearne Mon. 113

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convey his Equity of Redemption by Deed.
To be effectual the Deed must have all the
necessary requisites of a Deed at Law.

But though the Mortgagor is nor
4 Ves 311. 4th Title at Law, decreed to be the owner
still in favour of the Mortgagee tho' will
3 Atk 734 Pas Mog 25. issue an Injunction to stay Waste &c. other-
wise the Mortgagor might with impunity
diminish the value of the Pledge and take
from the Security for the Mortgage.

Lecture 3rd

Interest of the Mortgagee in the thing
pledged is usually considered with regard to some
different periods.

1st Before Forfeiture. It remains precisely
Pas Mg 380 the same as at Common Law, and tho' they
2 Vern 156 have no exclusive jurisdiction over it &c. &c. the
Pas Mg 228 Mortgagee has the sole legal title to the Estate
Do 156. defeasible on the performance of the condition
Pas Ch 423 and the Mortgagee may take immediate
possession, which if refused he may obtain by
an action of Ejectment.

Hence it is said that any conveyance
or lease that the Mortgagor can make during
Dane 8 22 the time between the making and forfeiture
Pas Mg 380. of the Mortgage is void as against the Mortgagee.
This Maxim said is incorrect & means
only voidable by the Mortgagee.

Because

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Because if the conveyance was absolutely void third persons might take advantage of its invalidity which they cannot do. — 4 L.

As being then voidable it follows that the Mortgagee may upon notice duly given receive the rents and profits of the Mortgagors Lessee, both before and after the Forfeiture, unless the rents is payable to him who has the Legal Title. Doug. s 200 Pow. Mg. s 80.

A lease for years in the hands of a Lessee, may be mortgaged by the Lessee and then the Mortgagee is in the nature of an assignee of the term, and if he takes actual possession is liable for the covenants which run with the Land. Doug. s 438. Do — 444. 2 Vern. 275. Do — 374.

But if the Mortgagee is not for the whole unexpired term of the Lease he will be considered as the under Lessee of the Mortgagor and will not be liable as assignee upon those covenants which run with the Land unless he takes actual possession in which case he is liable as assignee for the enjoyment and profits thus far of this interest the same Forfeiture. 1 Ba. Pa. 105. Powell 92.

2dly After Forfeiture the Mortgagee has also only a chose in Action in which case without possession a mere right to hold the property as security for his Debt. — Doug. s 310. 394. 1. Atk. s 605. Pow. Mg. s 92. 113 — 178.

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The Mortgagee interest is lost at any time before Foreclosure by act of the Mortgagor

1 Vas. 367. Dan. Mtg. 170. by will or his death go to his Executor and not to his Heir for the Debt is the principle and the Mortgage but the accident.

2 Vent. 351. 1 Vern. 3. 2 Dan. 61-2. 621. Dan. Mtg. 170-1

Hence after the Forfeiture and before a Foreclosure the Mortgagee interest will not "prima facie" be subject to a Devise of Lands Tenements or Hereditaments.

I say "prima facie" for there is one exception to this rule viz. where the Mortgagee has no other Estate in Land to satisfy except his interest in the Mortgage it will pass under those terms Unless such were the Testators intentions.

Authorities cited.

It has been decided that the assignment of the Debt by the Mortgagee carries with it the Mortgagees interest in the Mortgage and this whether there be any mention made of it or not - a question not as yet decided in this State.

1 P. Wms. 458. 2 Eq. Ca. Ab. 355. Dan. 453-4. 1 Roll. Ab. 2 Ca. 81

The Mortgagee before Foreclosure can do any thing to injure the Mortgagors right or add any other incumbrance to that which the Mortgagee has made - (i e) he can't make a Lease to stand in the way of the Mortgagors right of redemption.

1 Eq. Ab. 320. 2 Dan. Mtg. 93.

Again the Mortgagee having but a Chattle interest before Foreclosure

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he shall not be allowed to commit any
waste as a General Rule and Therefore the
Cts of Ch.y will issue an Injunction for he
that no right to compel the Mortgagor in-
sulated. —

But to this General Rule there
are some Exceptions Viz. When the value of the
subject pledged is insufficient for the Secu-
rity of the Debt the Mortgagee will not
be restrained but in order to this he must be
a Mortgagee in Fee and not for a Term of years
for here the Mortgagor & Mortgagee himself
had not the Freehold and of course his Grantee
could not possess it. — The Mortgagee
were neither permitted to commit Equitable
Waste such is productive of no profit. —

In all cases of Waste whether the
security be sufficient or not the Mortgagee
shall account to the Mortgagor for the val-
ue of what he has taken & what must be ap-
plied to the Debt & principal and Interest. —

The Mortgagee is allowed by the
Mortgagor all the expences which he has
incurred in necessary repairs or preserving
the Estate from destruction these expences
are added to the principal and draw Interest.

The Mortgagee is made of an Estate
to which the Mortgagor had at the time no

3 Atk.s 723
2 Vern.r 392
Do 392
2 Ans.r Atk.s 95
3 Atk.s 723.
3 Atk.s 4
Do 518.
2 Vern.r 871
1 Wilson 34
Powell 95
17 Eliz.th 80.

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2 Vent 11 Powell 97 7 Bac Abr 432 (2)

Title and he a forward purchaser of the Mortgagee will have the benefit of the purchase this saving the Lords is "a grant on the old stock" —

3 Mod 318

Though the Mortgagee in possession is not bound to insure & shou'd there for insurance against yet he may be remunerated for other expences — as for money spent in defence of the Mortgagor Title, & such expences as he can indict.

2 Roll Abr 144-6 Pub Ed 3 91 Dr 377 Powell 99, 111.

The Mortgagee takes the Estate subject to the casual incidents to which it was subject in the hands of the Mortgagor.

Hence if the Mortgagor in possession commits any act of Forfeiture in favour of the remainder under or reversioner the Mortgagees lien must go with the Mortgagors Title for the reversioners Title was prior to the Mortgagees and "qui prior est tempore potior est jure."

Authorities supra

If a Tenant for Life Mortgagee in Fee be "pur autre" forfeits his own Estate, but if by the commission of any offence he forfeits his Estate to the Crown or the Public, the

Rep. Mg. 111

Mortgagee does not lose his Mortgage in it.

The Public takes only the Estate of the Mortgagor "viz" his right of Redemption.

Because here the right of the Mortgagee is prior in existence to that of the Public,

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If in England the Mortgagee of a Term procures a new Term after the Expiration of that which was mortgaged to him, this second Term is redeemable by the Mortgagor. 7 Co. 6 Ch. 432.

Mr Gould thinks this new Term is wholly the Mortgagees, and ought not to be redeemable - But in England there exists a peculiar reason for this, for then Leases are generally renewed, as the value of property is then fixed - But here Leases are not renewed generally - a new higher Lease is then given Therefore Mr Gould thinks that this is not good Law in Connecticut.

Lecture 4

Of the Equity of Redemption, and of who may redeem.

That Equitable Interest remaining in the Mortgagor after Forfeiture is called his Equity of Redemption. Powell 14:15.

This interest is frequently called a Trust, and if it is in his hands for a Bailee can purchase until a Foreclosure - 2 Atk. 520 1 Atk. 606.

The Mortgagor or any person having an interest under him in the Land may redeem within a reasonable time - 1 Eq. Ca. Ab. 315 1 Vern. 193

If the Mortgagor becomes a Bankrupt his Assignees may redeem, for all his Estate. Bankrupt 1 Atk. 71

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2 Ch. Ca. 104. Estate and also his Equity of Redemption is by the act of Bankruptcy transferred thereto.

If the Mortgagor voluntarily assigns his
2 Vern. 304. Equity of Redemption or dies & his Assignee or the Purchaser may redeem.

1 Vern. 33. 150. So also the Mortgagee's Lessee may redeem.

An Equity of Redemption is in general governed by the same rules of descent as Legal Estates.

Heir. Therefore after the Mortgagor's death his Heir at Law may redeem a Mort-
2 Vern. 304. gage in Fee but if it be a Mortgage of
2 Ch. Ca. 104. Leasehold his Personal Representative or Executor must redeem.

1 Ch. Ca. 100. So may his Next of Kin Next of Kin (or Devisee) redeem.
2 Bac. Ab. 328.

2 Atk. 440. A Judgment Creditor may also re-
3 Atk. 200. deem the Crown Law for a Judgment is an
1 Vern. 300. incumbrance on the Real Estate of the
1 Ch. Ca. 102. Mortgagor.
3 Bro. P. C. 420.

It is not so however in Com. Law for a Judgment Creditor has no priority here consequently he can not redeem any more than a simple Contract Creditor.

Nor if the Heir has not Estate upon the Land and has sold off the Land a title

a title thereby vests in him and he may then redeem. as he has now acquired all the Title possessed by the Mortgagor.

It has been a practice in this State to issue an Attachment or Execution on the Equity of Redemption + Fundam 72. Brown. see Dan. Ch. Pr. Error

In England when the commission of Treason or Felony, results a forfeiture of the offenders Estate to the Crown. the King only redeems. 1 Bro. Par. C. 422

If a Mortgaged Estate descends to an Infant. his Guardian may redeem Pre. Ch. 137.

The Widow of the deceased Mortgagor if she has a Jointure in the Land may redeem. I take this to mean where the Jointure is made after the Mortgage. Lloyd v. Gould for it before. It is unnecessary to redeem, for she has a prior claim.

If the Jointure was settled upon her after Marriage she may then redeem. though she is bound by the Settlement. and if she has only a part of the Estate settled upon her she may redeem the whole.

A Jointress has only a Life Estate and if she has joined her Husband in incumbrances

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incumbering ~~husband~~ her joynture as the
1 Vern 33 having a Power of redemption she shall pay
1 Vern 93 the Third of the Debt & Interest she pays
2 Ch Ca 212 these sole her reversion that may hold
Do — 112 forever against the Heir at Law tho' he
1 Vern 91 pay the Third.
1 Ch Ca 271
18 Eliz. 219 But on the other hand she
has not joined in incumbering the Estate
the Heir must refund her Third Interest &c
paid by her.

The Husband & the Mortgagor
being Tenants by the Curtesy may redeem
he having a Life Estate in the ——

But on the other hand the
1 Ch Ca 603 Mortgagors Wife has no right to re-
2 Ch Ca 112 deem as Tenant in Dower — This is
Do — 320 manifestly a distinction without a dif-
ference in Law and is now universally com-
plained of — as an unreasonable Advantage
upon the Wife &c.

In Consd of the Wd dower is
entitled to Dower in the Husbands Equi-
ty of Redemption.

In order to entitle the Husband to
2 Ca Ca 114 Curtesy in his Wifes Equity of Redemp-
Do 116 tion, there must have been an equitable
Action during Coverture for obtaining

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which in Equity is deemed Equivalent to an actual Seisin at Law.

Hence if one devises an Equity of Redemption, or equitable Estate to Trustees to hold to the Sole and Separate use of the Wife - the Husband can have no right to redeem after her death - for as to that Property she is a "Feme Sole" and being in the actual possession of the Trustee - she having no confidence ab[ou]t it and no intermission in it, he has no equitable interest and of course cant redeem.

1 Vern 298
1 Vern 289
D[o] 330
2 Ch Cas 114

A Subsequent incumbrance may redeem a former one - a second Mortgagee of the first - a third of the second - & so from this arises the doctrine of Tacking of which more hereafter.

2 Ch Cas 140
2 Vern 52
2 Ven 663
P Wms 117
D[o] 194

If a subsequent Mortgagee, Lessee or Creditor redeems the Mortgagor his heir or devisee may redeem all of them by the ultimate right of redemption is always in the Mortgagor unless he has transferred it to another.

P Wms 119-20
2 Ch Cas 107

And even if a Final release or quit claim of his Eq. Red. has been obtained from the Mortgagor by fraud or surprise or has been a defective title raised in his favour he

Chancellor
Same

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he may notwithstanding redeem.

If the Fee is considered as remaining in the Mortgagor tho' he may be different quantities of interest vested in different persons in the Eq. of Redemption.

2 Vern 744 2 Ves 762 Pl. May 22. 112. 120. If Trustees a Devise of an Eq. Red. be made to A for Life with remainder to B in fee and they wish to redeem. A shall pay 1/3 and B 2/3 of the Debt. - for it is established that a Life Estate is worth one third of the whole Fee

Pl. May 121 D° 442-4 1 Ch Ca 223 If the mortgaged Money is lent at a fixed time the remainderman may compel the Tenant for Life to keep down the interest during his Life.

2 Eq Ca Ab 590 Gilb Rep 66 Pl Mg 121 D° 444 2 Mk 294 3 Pr Wm 241 311 If the Tenant for Life pays the whole Debt and in meliorations and makes improvements, the remainderman or reversioner shall not be permitted to redeem out of the hands of his representatives without paying 2/3 of the lasting improvements, but no thing for the remaining third because he had the benefit of them during his Life &c

1 Vern 404 If after redemption in the Tenant for Life the remainderman applies to redeem during his (the Tenants) Life. he shall pay 2/3 of the Debt but after the Tenants death the remainderman may pay only what the Estate is really worth

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Lecture 5

An Equity of Redemption (in England) is not Assets at Law, for a fine forfeiture the Estate of the Creditor is gone at Law. — 1 Vern^r 411; 2 Ath^s 294

But in Equity an Equity of Redemption is Assets for the payment of Debts. — 3 P. W^ms 341; 2 Vern^r 61.

If the Mortgagee the Heir at Law sells his Equity of Redemption a Creditor by Judgment bound cannot avail to the Executor. whether it be a mortgage in Fee or for Years and out of this Land there is no priority of claim. but the Creditors are to be paid "pari passu".

In Const^t all Equities of Redemption are Assets at Law. and may be sold for the payment of Debts. for here an Eq^y Red is recognized at Law and not in Equity only as in England.

In England the reversion after Land of the Mortgagor on a determination of a Mortgage for Years is legal Assets but this is not the Equity of Redemption. therefore the provision by "Power" of Fee Estates is useless! — Judgments may be recovered against him. before the Estate has vested. but the Execution cannot be taken out till the reversion of the Estate to the Mortgagor. — 1 Vern^r 125-6; 2 Vern^r 61; 1 Ath^s 354.

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2 P. Wms. 412
2 Atk. 30.
1 Ves. 112-13
1 Ves. 184
Ves. 63. 64
1 Ves. 101.

An Eq. Redemption is devisable and tho' a mere legal Estate may be devised for the payment of Debts. But the Debts are to be "paid" "out of pocket".

Formerly it was held that a mere Eq. Red. was not devised for the payment of Debts & distribution was to be taken in the nature of Assets. — Statute Judgments Cor. &c. and simple contract Debts if they did not attach to the Land so devised were to be paid in proportion and by average and so of other equitable incumbrances. —

P. Wms. 1 266
Ves. 63-4

It was held in Lord Keeper Wright's time that when Land is devised "for the payment of Debts and Legacies, the former shall have no preference over the latter but to be paid "pari passu". Mr Gould thinks this is not Law, but that the Debts would first be paid.

2 Ch. Ca. 271.
2 Vern. 270.
1 Mod. 117
1 Ch. Ca. 25
2 Ch. Ca. 248

Though according to the General Rule there is no priority of Debts, yet an incumbrancer by a devised Mortgage will have his Debt out of the assets of the Eq. Redemption in preference to the Creditors, who are not incumbrancers, because he has a lien upon the Land, but others Creditors have none.

1 Ves. 101
P. Wms. 130

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An Eq. Red. has never been held liable to a bond Creditor in the life time of the Mortgagor. 2 Atk.s 292 R. Mg.s 132

It was formerly doubted whether there could be what is called a "post fest. feasible" — of an Eq. Redemption. 1 Bro.C.s 14-15. Powell on Equation

This arises when a man dies leaving a son and a daughter by a first Wife, and a son by a second Wife. Now if after the death of the Father, the son by the first Wife is actually seized of the Eq. Red — those of the half blood it was held would not inherit, but on the death of the elder son, his sister of the first Wife, or whole blood, would inherit the Eq. Red — in exclusion of the son of the half-blood. — But if the elder son died before the Father, his sister of the whole blood could not inherit the Eq. Red. but it would go to the younger son of the half blood or of the second Wife. 87 Rep.s 213 1 Cobe 124 Roades 58. 1 Atk.s 604 D.o — 606. R. Mortg.s 132

It is a general Rule that no person shall be allowed to redeem, unless he has what is called the legal Estate, this is laid down in the books, is incorrect, & means rather the equitable Estate, and M.r Gould thinks no person is in general entitled to redeem, unless he has an equitable Interest in the Estate — though they may have a claim 1 Vern. 182 2 Eq. Ca. Ab. 605.

upon

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upon the person who has the legal Title. —
Hence the Creditors of the Mortgagor can
redeem generally.

But if the who has the equitable Title or interest, refuses to redeem
Bunn 130. then any other person who has an interest
in the Redemption may redeem. — — —

So if the Mortgagor has not redeem
Bunn 130
P. Mog. 34. his Creditors may, and a 2d & 3d &c. may do it.

This Equity of Redemption being a
creature of the Court of Chancery, that Court will
Cowp 601. always mould it to subserve & conform to the rules
2 Vern 336. and to the Maxim "That he who seeks
2 Vern 336 Equity must do Equity" — and in pursuance
16 Eq. Ab. 170. of this Maxim the Court will decree a reconvey-
ance, in favour of the Mortgagor or those
claiming under him either absolutely or
conditionally, as the justice of the case may
require.

Thus when the Mortgagor has
2 Vern 336. wantonly, attempted to avoid the most
just & Deed at Law he will not be permitted
in Equity to redeem unless he has paid all
the expence he has put the Mortgagee
to at Law.

The Mortgagee can never com-
1 Vern 232 pel the Mortgagor to redeem before the
183. 394. day of payment but in case of Bargain & Sale

Sears

Real Property. — Mortgages.

Court hand upon the Mortgagor he may come to the Mortgagee to compel him to accept even tho' the day of payment is —

On the principle that he who seeks Equity must do Equity the Court will permit no unfairness on the part of the Mortgagor. — 1 Vern. 26. 2 Ca. Ch. 299. Note 74.

In a late case where two distinct Mortgages to the same person, to secure two distinct Loans, one of which securities is sufficient, and the other insufficient, Court will not permit the Mortgagor to redeem one without redeeming both — 1 Vern. 2. 1 Vern. 245. 2 Vern. 207. 2 Vern. 386.

If in the same case after the Mortgagor dies his heir claiming both the debt & endeavours to rid himself of the Loan, he will not afterwards be permitted to redeem one without the other and also pays the Mortgagees costs at Law. — 2 Ld. Ca. 23. 18 Ca. Ch. 357. 1 Vern. 245. 2 Vern. 207.

But if the heir claims one of the securities in Exchequer then to redeem one he needs not to redeem both for he holds as a stranger to his ancestors Title. — Authorities supra.

Mortgages. Real Property.

Sp. Act. 6 Ves. 17

1 Vern. 336 & 464. 476 Salk. 155.

A purchaser of the Mortgagee will hold the Land against the Mortgagor and his Heir for the whole sum due to the Mortgagee on the Mortgage, though he borrowed it at a discount - and though the purchase was made for 10 pounds is due on the Mortgage.

Salk. 154 2 Vern. 353 Vern. 29. 476. Ca. Eq. Ch. 330.

But as against subsequent incumbrancers or Creditors the purchaser will hold only for the amount of what he gave though it be less than the whole Mortgage -

The reason of this Rule is very unsatisfactory. For it is said that a subsequent incumbrancer and Creditor stands higher in equity as a purchaser and by getting the Legal estate from the Mortgagor will make them equal. - My Lord does not think the equity of the Creditor as high as that of the Purchaser.

Authorities cited

So where there are several incumbrancers and the Heir of the Mortgagor purchases in the first Mortgage and consequently gets the Legal Estate it shall not stand in the way of the subsequent incumbrancer for more than he gave. This goes upon the ground that the Heir represents the Purchaser. -

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It is a general rule that if the Heir Executor, Trustee, or Agent of the Mortgagor purchase in any of the incumbrances at a discount they shall hold against the subsequent incumbrancers for so much only as they paid. —

1 Vern 49
1 Vern 335.
2 Atk 54

But tis said if the Mortgagor heir, or Trustee, or a Stranger purchase in the legal Estate to protect on incumbrance of their own they shall hold untill they are paid the whole sum due then is is not only their own incumbrance but the Mortgage which they have purchased although they may have purchased it at a discount. For tis a Maxim that when Equity is equal the Legal Title shall prevail.

1 Vern 49
3 Mod 323.

If the Mortgagor is indebted to the Mortgagee a Sum and upon the Mortgage (as by bond) he cannot redeem without paying both debts, page 81

1 Vern 41
1 Vern 244
Salk 84
2 Eq Ca Ab 603
Pr Ch 511-15

But if the Mortgagee brings a Bill for a Foreclosure he cannot compell the Mortgagor to pay both debts (i e) the Debt not secured by mortgage. A late Case of this kind of Elsworth vs Phelps was determined & thus & though this is undoubtedly the Law

Authorities for

* i e when there are subsequent incumbrances I conclude as page 81.

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As the Mortgagor cannot redeem without paying as well the debt which is not so due to the Mortgagee as the one which is so also his Heir that has same duty incumbent upon him. The same exception holds also in favour of the Heir when the Mortgagee petitions for a Foreclosure. It seems hard to it would make that part of the proceedings concerning what is not in the power of the Heir and in the other case the only mode in which they effect their object is by refusing to redeem or even intending to redeem unless all complies with the terms they impose upon him vizt that he shall redeem as well the debt which is not owned as the one which is.

1 Vern^r 245.
1 Wms 775.
1 Vern 87
1686 f 97.

Upon the same principle it is that if a Term for years is mortgaged & the Mortgagee dies his Executor or Heir may redeem. Shall they as well the Debt that may be due from the Mortgagor to the Mortgagee which are not owned by the Mortgagor as that for which the Mortgagee is seized. Mr Gould thinks that he is as much bound to pay the simple Contract Debts which are not owned as if they were specialties for the mortgaged premises shall redeemed are

2 Vern^r 177.
3 Salk. 240.
Pu 6 f 73 12.

Affects.

Real Property.

Mortgages.

Assets in the hands of the Executor liable to payment of Debts of the description ---

Where there are several Mortgages and the first Mortgagee sues at the Debts against the Mortgagor then first secured by Mortgage, shall the Debts also be satisfied out of the Assets of the subsequent incumbrancers and this whether such subsequent incumbrancers be by Mortgage or Judgment or Statute ---

2. Atk. 52
3 Salk. 84
3 Salk. 290.
1 Vern. 87
3. Atk. 550.

But since the Statute of 3 and 4 of Wm and Mary against fraudulent Devises the Devisee of an Eq. Red. can redeem without paying or being debtor to the Debt secured by the Mortgage — for he is a mere volunteer and ought not to be placed in a better situation than his Devisor. ---

Pre. Ch. 511
1 Eq. Ca. Ab. 325.

The same rules which have been laid down in favour of the Mortgagee and also as to the Mortgagor who will be allowed to take a Conveyance of the same as well as the Mortgage debt paid before the Mortgagor or his representatives can redeem — for his Equity is as great as that of the Mortgagee himself ---

2 Ch. Ca. 351
2 Ca. in Ch. 145
Do 145

In case of the Friend of Executor or Debtor dying bound in Bond and there is an application by the Mortgagee

Mortgages — Real Property

2 Ves Jr 244 — Mortgagee on his redemption suit to redeem
R. Mag. 176 — the heir cannot set 3 & 4 years beyond the
2 Ch. Ca. 611 — penalty of his bond if the Mortgagee and
3 Atk. 218. — intend to extend it. for the Equity is only
2 Vern. 432 — intended "in favorem" to include the Performance
Salk. 154 — performance of the Contract.

But if the Mortgagee refuses to foreclose this bill will be
done for him the Mortgagor is the Defendt.

If in the case above mentioned
the Mortgagee commits a fraud upon
2 Vern. Ca. 131 — a third person by concealing this bond debt
R. Mag. 147 — the person so imposed upon may redeem
without paying the bond debt so kept from
his knowledge. and the rule is the same
as applies to the Mortgagee Assignee. —

The purchaser of an Eq. Red for a valu-
2 Vern. Ca. 89 — able consideration may redeem without
Do — 511. — the bond debt upon paying the principle
Strange 1107. — only. He stands upon the same ground as a
1 Vern. 87 — subsequent incumbrancer. and in his
2 Vern. 682 — hands the Land shall be charged with nothing
18 Ves. Ch. 325 — but what is an immediate lien upon it.

Hence by way of Corollary from the
above rules it may be laid down that the
Mortgagee claims for his bond debt is good
only against the Mortgagor and his repre-
sentatives. —

Real Property.

Mortgages

There has been much controversy in the English Courts of Ch.y as to how far the Statute of Limitations runs upon the Eq. Redemption — or in other words, how far the Mortgagee is affected by the Statute, the Mortgagee being in possession. —

It is now settled that length of possession by the Mortgagee is not pleaded as a bar to the Mortgagor's right of redemption for this possession of the Mortgagee as such is not deemed to be adverse to that of the Mortgagor. — 18 Ves. 315 / 15 Ves. 387 / 3 Mk. 313 / 3 Ves. 287 / 8 Savage 418.

Still the Courts of Ch.y in England do so far imitate the Statute as to consider the Mortgagees possession for 20 years (which in England is an adverse claim gives a Title) as "prima facie" a bar to the Mortgagors right to redeem. — 18 Ves 315

By a "prima facie" bar is meant, that after such a possession by the Mortgagee there is a presumption raised that the Mortgagor has abandoned his right to redeem. —

This presumption however is liable to be rebutted by proof of such circumstances as do reasonably account for the Mortgagors delay, consistently with the idea that he has not abandoned his right to redeem.

(eg)

Mortgages

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Eq. The Statutes of Limitations of disability, the being an Infant, a married woman, insane, beyond Sea, &c. in all which cases the presumption will be removed, and the Mortgagor admitted to redeem though 20 years have elapsed since the Mortgagee went into possession.

In Conn.t 15 years possession is a "prima facie" bar.

This presumptive bar may be removed in other ways as by circumstances or acts of the Mortgagee which show that the Mortgagee has recognized the Mortgagor's right within 20 years in England or 15 years in Connecticut.

2 Vern 340
2 Ath 333.
2 Ves 15 418.
16 Pr. Wms 49

And as the Mortgagor is not presumptively barred and foreclosed in less than 20 years in England and 15 years in Connt after forfeiture & also the reason of this rule ceasing during that period as any disability he has after the removal of the disability 10 yrs in England and 5 in Connt to claim his right to redeem.

3 Pr. Wms 287

But when there has been any fraud practised by the Mortgagee to deceive the Mortgagor of his right of redemption (as by getting the Mortgage an absolute deed without a defeasance) no length of time

2 Atk 151.
Talb 93.

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time will be a bar. For it is a general rule at Law as well as Equity that no length of time will be a bar to an express trust. — 1 Sid. 424 in Ch. 4 Ch. 16.

After the Statute of Limitations and attaches it will continue all operation (i.e.) of the 20. or 15 years have run before the subsequent intervention of any of the aforementioned disabilities will not prevent a bar by 20 or 15 years possession. — 2 Vern. 418. 2 Atk. 333. Gilb. Rep. 185. Eq. Ca. Ab. 315.

Where it is agreed that the Mortgagee shall take possession and hold until his debt shall be satisfied out of the rents and profits no length of possession under such an agreement is a bar to the Mortgagors right of redemption. — 1 Vern. 418. Prec. Ch. 156.

The rule is the same in what is called a Welsh Mortgage and there is here no bar of the right of redemption (i.e.) Where the agreement is that the Mortgagor may redeem by paying the principal and interest on a particular day in any year. — Cas. Ch. 4. 23. 1 Salk. 157. 2 Vern. 701. 2 Atk. 363. 4 Burr. Ca. Ch. 359.

As a general rule any act of the Mortgagee which has within 20 yrs. in England & 15 in Ireland manifested the right of the Mortgagor to redeem will prevent the running of the presumptive bar. — 1 Burr. Ca. Ch. 309. 5 Do. 194. 2 Eq. Ca. Ab. 590.

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Dan. Eq. 100
2 Atk. 140

It is said in the Books that if the Mortgagee submits to be deemed (as) if on a Bill to redeem the Mortgagee does not dispute on the lapse of time it will be no Bar

Dan. Eq. 160
Do. 161.

If the Mortgagor himself continues in Possession no Prescription can be run against him and of course it is never barred by lapse of time

By Statute 4 an. 5 of William and Mary. If the Mortgagor is declared of his Eq. Red. & the Mortgagee guilty of fraud upon a subsequent incumbrancer by concealing from his knowledge any prior incumbrance.

2 Vern. 589
1 Eq. Ab. 325

There is no such Statute in Country

Ld. J.

Effects of the Devise of Lands mortgaged.

The interest of the Mortgagee in the Land Mortgaged is a mere Chattle interest which he may devise and

1 Ch. Ca. 33.
Powell 166.

That Devisee of the Mortgagee has the right of Foreclosure

Cooke Ch. Ca. 447-9-50.

It was formerly holden that if one devised in these words viz "I devise all my Mortgages" — his whole interest in a Mortgage (tho could not) pass it being forfeited but that the Devisee took a mere Life Estate.

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Mortgages.

Some lawyers to subdivide that the interest of the Mortgagee is but a Chattel interest. It is to be presumed that a Court would consider the words as conveying all his interest in Mortgages whether in Fee or for a term of years.

The Mortgagees interest will not "pass" past as a Devise under the description of — Lands, Tenements & Hereditaments — If however the Devisor has no other property answering the description of Lands &c the Mortgaged premises may pass under these words. —

Whenever a Devise brings a bill to foreclose there the heir only has interest in the Eq. fund. — But the Mortgagor, heir not to be made a party to it.

It is said by Powell that a Devise of Money due on a Mortgage, does not carry the interest of the purchase which was due at the time of the Testators death. — Mr Gould says this is much too general for it must be confined to cases where the phraseology limits the bequest to the principle.

It is a question whether the Mortgagees interest will pass under a Devise unless the will is drawn according to the Statute of Frauds. - (as altered by Lord Wottesley)

2 Burr. 978.
6 H. & J. 447-50.
Powell 157-70.

2 Vern. 621
1 Vern. 3
2 Vents 351.
Barnard 457
2 Eq. Ca. Ab. 606.
2 Bl. Rep. 61.

1 Bl. Rep. 33
Eq. Ca. Ab. 318.
Powell Mg. 175.

Barn. Dict. 259
2 Atk. 113
Powell Mg. 170.

1 Roper 684
Cath. 481.
3 Madan 290.

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The Cases & Opinions seem to be that the Will Prest. for that Statute relates to Lands Incumbered and Encumbrances only - and these Terms only include Mortgages. - -

Of Priority of Incumbrances. -

2 Bur. 978.

If there are several Mortgages on the same Incumbrances on the same Estate prior by takes place among them according to 1 Ch. Cas. 142 the respective dates of their claims tho' 2 Vern. 68. above to the Maxim of prior in time Pow. 181-90 "potior in jure" Salk. 88.

This priority may be forfeited and a prior incumbrance postponed to one that is subsequent. - -

2 Vern. 573 1st This happens when the prior in 3 Ch. Ca. 280 encumbrancer has been guilty of some fraud or 1 Vern. 360. neglect affecting the interest of the subsequent incumbrancer - - -

So if the first Mortgagee is without notice of a second mortgage and neglects to inform the subsequent Mortgagee of his own Mortgage he shall be postponed and the second will gain a priority. — — 1 Ch. Ca. 357.

It is said that the witness would be examined to know the contents of the instrument. This however says Mr Gould is a very harsh rule and it has been said so it is notorious that subscribing witnesses in common experience are wholly ignorant of the contents of the instrument which they attest Lords Thurlow and Hardwicke have expressed their disapprobation of this Rule.

And upon the same principle if the prior Mortgagee is guilty of any negligency by which a subsequent Mortgagee is induced to advance Money on the same security the latter shall obtain priority 2 Ch. Ca. 70. 1 Vern. 360. 1 Vern. 136. 3 P. Wms. 280. 2 Eq. Ca. Ab. 486.

As when the Title Deeds are left in the hands of the Mortgagor who was enabled thereby to represent himself as the possessor of the Legal Title and one was thereby induced to advance money on the security — Here he was preferred to the first incumbrancer — for it is a Maxim that where one of two innocent persons must suffer he who has been the procuring cause — 1 Ch. Ca. 269. 2 Vent. 337. 17 Rep. 3. 4. 55. 2. 63.

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cause of the suffering of either shall him self suffer.

In England the pledging of Title Deeds creates a lien upon the Estate and Ch^r will compel the sale of the Estate to satisfy the Pawnee.

2 Eq. Ca. Ab. 86.

If one is about to advance money on a mortgaged security and after paid Mortgagee takes a Mortgage on the same and informs him at the same time that he is about to lend Money on the same premises if the first Mortgagee denies that he has any Mortgage on it & he shall lose his Security & advance upon the said Mortgage.

2 Vern. 554.

But if the second Mortgagee does not inform him that he is about to advance money the other is not bound to satisfy his enquiries for then we should be obliged to satisfy the impertinent curiosity of every idle Enquirer &c

2dly Of Tacking. or Forfeiture of Priority.

A subsequent Mortgagee may without notice of the second or any intermediate one) purchase in the Legal Estate & so defeat the first Mortgagee of his own Equity.

And if a subsequent Mortgagee purchases the first Mortgage with a view to

involved

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Tho' not an incumbrancer of his own he shall be preferred to the intermediate incumbrancer. for it is a rule in Equity that "where the Equity is equal the Legal title shall prevail" —

1 Rep. in Ch. 87-8.
2 Vern. 337.
3 Ch. Ca. 220.

In order however to gain this priority it is necessary that the third or subsequent Mortgagee (Lent upon a valuable consideration and "without notice of the intermediate Mortgage — else the Equity is not equal and he shall gain no priority

2 Vern. 573
Mag. Ca. 240.
1 Atk. 53.
1 Ld. Ca. 310.
1 Vern. 374.
2 Vern. 339
2 Vern. 374.

And this is what is called in the Law of Mortgages Tacking. (i e) tacking the Legal Estate to the Equitable one.

And a subsequent incumbrancer may tack not only to the first Mortgage but to any other incumbrance which carries the Legal Estate. —

2 Vern. 279
1 Vern. 49

A subsequent Mortgagee may tack though he had notice at the time of taking the Mortgage, provided he had not notice when he made the loan under expectation of being secured by the Land

Authorities supra
2 Vern. 374.

A priority may be acquired by a subsequent Incumbrancer who has no ground in equity to call for

2 Vern. 486.
2 Vern. 500
2 Vern. 2
2 Ca. Ca. 213

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for the Legal Estate when the prior Incumbrancer for he who has the most equitable Case is presumed Thus if A lends on the Incumbrances the Third having contracted for the Legal Estate or a Case entitled to buy for it (though he has not actually paid for it) will thereby acquire a Priority over the second Incumbrancer

Dan. Abr. 194
204. 212. 281.

If the prior legal Incumbrancer can not only Part of the Estate comprised in the latter Mortgage the prior will be entitled only to so much of the latter Mortgage as comprehends.

2 Vern. 339
1 Ch. Ca. 52.

But if the first Incumbrance covers more than is comprised in the latter Mortgage by taking Part of the Estate the Debt can be paid by the intermediate Mortgagee.

1 Ch. Ca. 201
1 Eq. Ca. Ab. 323.

Sec. 8.

If a subsequent Mortgagee purchases in a prior Legal Incumbrancer acquires the Legal Estate She may set up this in Equity, and thereby acquire a Priority to the intermediate Incumbrance A Satisfied Incumbrance in this case is one which is satisfied in such a manner as that relief can be had on it only in Equity A Mortgage paid or satisfied at the Day & Time does not vest the Legal Estate in the Mortgagor but remains in the Mortgagee, yet he will be

1 Vern. 184
2 Vern. 30
2 Vern. 159
Hard. 318
Hard. 172
contra Simmons
1 Rep. 136

compelled

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compelled by Ct to renounce ——

And the prior incumbrancer of Purchaser in this case will be entitled to his prior by even though he paid no consideration for the satisfied incumbrance. And just so it has been decided in one case that even though the subsequent incumbrancer & Plaintiff & the satisfied incumbrance by fraudulent means he might nevertheless tack it to his Equity!!! This is certainly not equitable, but do I believe it is now to be Law. "J Gould."

But where a prior incumbrance is deficient in legal & equitable it cannot be tacked to to obtain a priority. — Ct cannot dont convey the Legal Title. ——————

A subsequent Mortgagee cant tack to any other than that which conveys the Legal Estate — Save if the 2nd Mortgagee purchases in the second he acquires no priority over the third — for the second Mortgagee has not the Legal Title.

A prior Mortgagee purchased in by a subsequent incumbrancer will give him no priority unless the prior Mortgage is forfeited — Because before then it is no Eq Fund.

And as a subsequent incumbrancer may by purchasing in the Legal Estate gain.

1 Eq. Ca. Ab. 35
1 Vern. 279.
1 Eq. Ca. Ab. 323
1 Vern. 33-3
2 Vern. 159
Burbury 298.
2 Vern. 234
1 P. Wms. 340
2 Eq. Ca. Ab. 592
7 Vin. 54
2 P. Wms. 493
12 Rep. 173
2 Vern. 165

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gain a priority, so he still has the Legal Estate many back a subsequent sum advanced by him to the Mortgagor upon the same Security to such Legal Estate: provided he had no notice of the incumbrance. But if the first Mortgagee has notice of the subsequent incumbrance at the time of making the subsequent loan he cannot tack &c. ——

2 Ch. Ca. 119.
2 Dᵒ — 20
2 Atk. 352
2 P. Wms. 494
2 Vern. 662
See also Duke 226
2 Eq. Ab. 325 pl. 1.

The subsequent incumbrancer to tack must have equal Equity, as well as the Legal Title.

Therefore though in England a Statute or judgment will convey the Legal Estate, yet a subsequent judgment creditor or incumbrancer cannot by purchasing the first incumbrance tack the legal Estate to his judgment claim. ——

2 P. Wms. 491
2 Vern. 662
Duke Ch. Ca. 494.
Dᵒ — 310
1 Eq. Ab. 325
Duke 226

Neither can a subsequent Mortgagee tack a judgment incumbrance of his own to the Legal Estate which he has purchased.

The reason is because the judgment Debt is not a specific lien on the mortgaged premises but only a general lien. There is therefore not equal Equity.

If the first Mortgagee makes a subsequent loan and takes obligation or judgment by way of security he may tack that

2 P. Wms. 494

Judgment

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judgment debt to his legal & Equitable provided he had no notice of the intermediate incumbrance at the time of making the last loan &c — 2 Vern 662; 7 Mod 359.

If the Deed of the first Mortgage contains a clause providing that the Mortgaged premises shall be a security for all subsequent loans such loans shall have a relation to the first contract and be considered as part of it & the first Mortgagee shall gain a priority for all these subsequent loans over intervening incumbrances though he had notice of them at the time he made the loans. (if the intermediate Mortgagees had notice of such clause) — Powell 229; Powell 232; 7 Vin 52 "for the sums" priority.

"Where the prior conveyance under which one wishes to claim is defective, notice of such incumbrance or conveyance will not prevent the subsequent Mortgagee claiming because being defective the Legal Title is not in the prior Mortgagee but "all in Law" — in the subsequent Mortgagee and Equity will not interfere to compel it to give him the — It is doubtful (say) if Equity enforces this rule it cannot be principle because Equity will compel the Mortgagor to make good the first Mortgagee Title and satisfy the defect — A defective security, will — 3 Bac 674; Powell 204; &c 232; 3 P Wms 491.

Mortg. 61.

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1 Eq. Ca. Abr. 320
2 Vern. 564
Salk. 449
3 Bac. 643

will be entered in Equity against Creditors who have only a general and not a specific lien upon the Estate.

In all these cases where Notice varies the rule of priority, if one of the parties changes the other in his Bill with Notice he must in his answer deny it or it will be taken against him "pro confesso."

Fac. El. 226.
2 Vern. 351
3 P. Wms. 243.

2 Vern. 450

The rule is the same if the Bill charges special facts which amount to a Notice.

1 Vern. 66. 95.
1 Ba. & Be. 52
Fac. El. 19
2 Atk. 19. 141.

When the party charged with Notice denies it on Oath and there is but one Witness to support the allegation the Bill will be dismissed.

Le Neve

Notice.

As the right of the subsequent incumbrancer in certain cases depends on his want of Notice, it remains to enquire what this Notice is. Notice is of two kinds viz.

Actual and Presumptive.

Fac. El. 250.

A man is said to have actual Notice when he is regularly told of the fact by the other party or when he is party to or privy to that which shews the fact of notice. But a flying report is not deemed to be actual Notice, for the charges of actual notice must be founded on some thing certain and circumstantial.

Fol. Eq. 147
2 Vern. 250.

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Presumptive Notice is a conclusion of Law, that one has had notice of a fact, though no actual proof is exhibited against him. and as a General rule if one shall make Title but by a Deed containing the fact that he shall be deemed to have Notice of that fact because he can make title only through the Deed containing the fact. — 1 Vern 319 — 2 Vern 662 — 2 Eq. Ab. 685. — Gilb Eq. Rep. 8.

So if John Stiles devises Land to A. subject to the payment of Legacies and A mortgages this Land to B. B shall be deemed to have notice of these Legacies for he makes Title through A under the Devise — Ambler 565 and notes — 1 Vesey 215.

But to this Rule there is an exception in the case of an assignment of personal property by the Executor. Since the purchaser is not deemed to have Notice of the pecuniary debts for he cant know how much they amount to when compared with the Debts and Charges under the Wills. — Ridg. t. Hardw. 61 — Do. Cases temp. Talbot 361 — 1 Vesey 173.

How far he is bound by specific Legacies does not appear to be fully settled but I would seem from a single case that the rule of Notice applies. — M'Gouldrick however doubts it. for if the purchaser knows that it is devised how does he know but that it is wanted for the payment of Debts? the Purchaser can direct that this rule does not apply to him as an — 2 Vern 414 — Do — 676 + — 1 Vern 215 + — 1 Vesey 173 — 3 Atk. 230. — 2 Vern 748.

title

Mortgages.

Real Property

a rule of personal property is specifically
denied.

It is also a rule that if a Deed or
other conveyance change upon the Estate is
2 Vern 486 delivered either by Deed or with any other pa-
2 Vern 384 per to the intermediate purchaser of the Estate
Pre Ch 271 he is presumed to have notice of the charge
for the papers are supposed to be delivered to
him for the very purpose of his investigating
the Title. and if he does not make the discov-
ery it is his own fault and he is guilty of gross
neglect.

So also a recital in a Deed stat-
2 Atk 54 ing or even implying that there is an in-
1 Vern 387 cumbrance on the land created by another Deed
this is presumed to be noticed to the per-
sons who has had possession of such Deed.

Whatever facts are sufficient to put
3 Atk 490
1 Atk 522 the party charged with notice upon en-
quiry are deemed good notice in Equity.
Thus where persons entitled to an Estate
found a person in possession of it. and re-
ceived rent from him two years after they
became of age that was held sufficient No-
tice of a Lease made by their Guardian. and
a ground whereon to conclude that they had
ratified it. for finding a person in the Es-
tate was sufficient to put them on an enquiry

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And in analogy to this rule it would seem thought it it has been laid down that possession by a prior Mortgagee would be deemed in Equity as good notice to a subsequent one of a prior Incumbrance. Fonb. Eq. B. 3. C. 2. § 10.

Notice to our Agent Attorney or Counsel, is deemed good Notice to the principal himself, and this rule obtains in all similar cases. 1 Vern. 69. Do. 61. 2 D. 477. 485. 2 Vern. 574. 1 Ch. Ca. 38. Wilson Rep. 5 Ed. 3 Ch. Ca. 110. Pow. on Mg. 272. 1 Vern. 63.

If one person in the name of another without any authority from him, to do so do — he not being privy to his intention. yet if he afterward agree to it, he makes the former his agent — "ab initio." 2 Vern. 609. 1 Bro. Ch. Ca. 244.

In Connecticut it is so much a Question whether one can take over a prior Incumbrance. that no one as yet has attempted it. It seems to be the better opinion that it cannot be done. Mr Gould is of the same opinion. because by our Law a Deed to have effect against third persons must be registered recorded in the Town Record. and of course every person may have Notice of any such intermediate Incumbrance. Stat. Law. 47. 48.

Grants

Mortgages.

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Incumbrances by looking into the Records which are accessible at all times, and which are kept for the express purpose of affording this information. If the Vendor does not give to the Purchaser notice he is guilty of gross neglect of which he will not be permitted to make any complaint.

In England in what are called the registering Counties such recording of the intermediate incumbrances will not be considered notice to the subsequent incumbrancer so as to take from him the benefit of protecting himself by his Legal Title such he has purchased (i.e.) a subsequent Mortgagee may take over intermediate Mortgages though they were registered provided he had no actual Notice of them

1 Ro. Ca. Ab. 378. 2 Ro. 609 Powell on Mort. 285 286. 287

A subsequent Mortgagee registering is preferred to a prior one not registered if the subsequent one has not notice of the prior one when he took his Mortgage.

Bug. 564. Cowp. 712

But if the subsequent Mortgagee had actual Notice of the prior Mortgage though it were not registered he will gain no priority by registering his own Incumbrance but is considered in Equity as fraudulent as the party has all the Notice the Law intended he should have.

2. Vern. 275 3. Atk. 546. 1 Vern. 64 2 Ba. Ab. 420

Real Property.

Mortgages.

A purchase or Mortgage for valuable consideration may take over prior voluntary conveyances though he had actual Notice of such voluntary conveyance at the time of the purchase or loan: Such voluntary Settlement being made void against a purchaser with or without Notice by the Statute 27th of Elizabeth. — 1 Eq Ca Ab 334; Cas in 280; Do 711; Pas Mg 206; 9 Co 60 a 130

One purchases with notice of a prior incumbrance and sells his Mortgage to a third person who has no notice. the latter will not be affected by such notice but may take — 1 Eq Ca Ab 331; Talbot 187; 1 Mk 371

So also if one purchases with Notice of one who purchased without notice he may take. Again if A has notice and sells to B who has no notice and B sells to C who has notice. C may take &c — Pre Ch 51; 2 Ch Ca 60; 4 Do 125; Snyder 488; &c

To whom the Mortgages Interest belongs on his Death.

Formerly it was doubted whether in the realty or personalty representation took it (i e) whether it belonged to the Heir or Executor — And accordingly — 1 Ch Ca 88; 1 Vern 1st 1; 1 Eq Ca Ab 328

But now since the 15 of Ch II considered the contract as personalty it is a Rule that it goes to the personal representative only —

1 Ch Ca 128; Do 283; 2 Vent 348

Mortgages

Real Property.

2 Ch Ca 312. 1 Ry. 220. Hard 3 407.

unless otherwise expressly disposed of by the Mortgagee

If when the Mortgagee dies he has not taken actual possession. It will go to his personal representatives. — — —

Authorities Index

But if he has taken possession after Foreclosure it is considered as Real property and will go to the Heir. But if he had not taken possession it would go to his personal representatives — — —

There are two reasons why the personal representatives should have

Powl Mortg 209. 301.

First because it is personal property in the Mortgagee. — — —

Second. because the Money lent on the Mortgage was first personal property and has diminished the personal Funds

16 Ch Ca 283 Powl 1 Mg 299 Do - 302 Bunn 30

If the Money is payable by the terms of the condition to the Heir or Executor of the Mortgagee before forfeiture the Mortgagor may pay it to whom at his election.

If the Mortgagor on the day of payment pays the Money to the Heir he is compellable to pay it over to the Executor for it belongs to the personal Estate. — —

2 Vin Ab 331 Powl Mg 302

But after forfeiture the Money is to be paid to the Executor. Lyddal-

Bunn Dist 49. 50.

Real Property

Mortgage 1.

A Ex^r if he pays to the Heir the Heir is compellable to pay it over to the Executor. — — —

Mortgages

Real Property

If the owner of the inheritance considers his Estate as real & will be so considered after his Death. — Thus if a Person purchases the Interest of the Mortgagee by an absolute Deed and the Estate is afterwards redeemed the Money shall go to the purchasers Heirs and not Executors

2 Eq. Ca. Abr. 469
1 Vern. 271
2 Vern. 381
Pre. Ch. 265.
2 Bac. 404.

So if the Mortgagee or his Assignee devises his interest in such Estate the Heir of the Devisee will take it and not his Executor

Authorities cited

Money which is deemed by Mortgage and directed by the Mortgagee to be laid out in Land will on his Death go to him to whom the Land would have gone had it been so laid according to the articles i.e. to the Heir at Law, for tho' considered as Land, that ought to be done

3 P. Wms. 217.
2 Vern. 358.

If two persons lend money jointly on a Mortgage they are not joint Tenants but Tenants in Common for in recovering the Land their object is security for their Money and not the survivor.

2 Vern. 258.
1 Ca. Ch. 358
3 P. Wms. 158.
1 Atk. 457.
2 Atk. 55
3 Atk. 733
1 Bro. C. 15.

Interests of the Mortgagors Wife.

At a Jews Court they join in levying a Fine and bind themselves & the way incumbers but Dower by joining in a Mortgage.

Tenants 2 Ca. Ab. 74.

If the Husband alone makes a Mortgage during Coverture the Wife's right of redemption

Wms. 2 Vol. 94.

is

Real Property — Mortgages

is paramount to all other Claims. — — —

A Joint Act of Bond Mortgagee may on the death of the Mortgagor and when there is if she do not join in encumbering her Representatives may hold one undivided part of the whole sum which not paid to redeem.

This rule applies to those cases when the Joint Act was made after the Mortgage

3 Bac. 228
2 Vern. 213
1 Ch. Ca. 127
Vern. 191. 218.
Pas. Eliz. 21
313. 310.

But if a Joint Act has joined in encumbering the Estate. She shall then equally with the rule pay one third of the Debt for this is deemed to be value of a Wife Estate. — —

If a Settlement be made on the Wife of the Mortgagee previous to the Settlement 3 Bac. 228.
exhibited only on the articles &c. the Settlement 2 Vern. 343
is not actually made by the Wife may redeem 2 Vern. 334.
But when the conveyance to the Mortgagee to have been made without notice of the articles
Here she does not claim at Dower but Cut as a Purchaser under the articles. — —

If a Joint Act after marriage join in 1 Vern. 191
levying a Fine and Mortgage the Land. on the 1 Ch. Ca. 310.
Husband's death she shall pay one third of the Gilb. Eq. 100
Mortgage Money if she redeems. — If she does not redeem she must keep down the Interest during her Life. — —

Mortgages.

Real Property.

If the first Mortgagee take the Mortgage
Powel 315 for a subsequent debt & from the same debtor,
1 Ch Ca 132 without notice of an intervening Jointure the
wife had as to both debts against the Joint-heir
for he has the Equitable right to the Legal Estate

But a Jointure settled in Mortgaged
Cowp 280 Lands & the Covenant is void against Subse-
Do 711 quent Mortgagees and all against Jointure
Pow Mt 316 dat even tho' they have notice of the Join-
& Vin 66 ture because it is merely voluntary and the
Husband has been no actual Loser and it is
said in the Case that all Columbary con-
veyances are fraudulent & —

If the Husband before marriage gives his
Eq Ca Ab 237. intended Wife a Bond conditioned to pay her an
2 Vern 480 certain Sum of Money, if she survives him she
Pow Mt 316 may recover as a Creditor and without notice
of the Condition.

If the Husband takes a Mort-
2 Vern 683 gage in the name of himself and Wife and
2 Ch Rep 304 dies, the Wife is entitled to the entire in the
Pow Mt 317 Mortgage by the Survivorship — However the
318 & 306. Mortgage Money is meant for the payment of Debts
the Claim must yield —

1 Atk 606 In England it is settled that the Mort-
2 Atk 525. gagee Wife is not entitled to redeem a Mort-
3 P Wms 229 gage in fee made before marriage. Because
Talbot 138 the Hus-

Real Property.

Mortgages.

because she has no Dower in it, and having
therefore no interest in the Eq. Red she cannot
as Widow to the Mortgagor redeem in Equity and so
his representation.

1 Bro. C.C. 138
Dr. 161
1 Bro. C.C. 326.
Contra
2 Ves. Sen. 400
Fr. Ch. Ca. 137
2 Cases 64

In Conn. the contrary
rule is established and the Mortgagor's Wife
has a right of Dower in the Equity of Redemption.

But in England the rule contemplates
a Mortgage in fee before marriage for after
marriage the husband cant take away the Wife's
right of Dower nor can he in any way incumber
it but by his sole act.

1 Cake 234.
Fr. Ch. 133
3 Vern. 403.

In England as well as in Conn.
the Wife is entitled to Dower in a reversion
expectant on term or Mortgage for years
for this is a legal Estate.

&c

Mortgage of a Feme Covert Estate and the
Husband's interest in his Wife's Inheritance

A Husband by marriage gains no other
interest in his Wife's Land than a Tenancy
for life and her joint Lives — or at most for his
own life, and to entitle him to hold it after
her Wife's death &c to entitle him to an Es-
tate by the Curtesy he must have had issue
by his Wife born alive and capable of inher-
iting the Estate. ———

It follows from the nature of the
Estate

Mortgage

Real Property

1 Inst. 351
2 Bl. Com. 127
4 Kent's Com. 63

Estate that he can't make a Mortgage for
Life. Said to continue as much for any longer
time than his own Life, as the case may be.
during their joint lives.

1 Rawle 331 3 Yeates 401
Salk. 386 pl. 41

However the joint
tenant may be bound on the Cove-
nant if he will be bound by a Common war-
ranty and his heir also.

2 Kent's Com. 131
Dan. Ab. 338.
Reg. Gilb. 51 a. 51

In Cons. of the Wife joins her Husband
in a Mortgage* or even an Alienation by Deed
the Cir. of Husband forever.

Stat. Conn. 215
* i.e. of her own
Lands.

At Com. Law, if the Wife either joins
her Husband in a Deed or makes one herself
conveying her own Land. The Deed in itself is ab-
solutely void and consequently can never be ratified.

Dane's 33
Com. Dig. 201
2 Kent's Com. 127
2 Bac. Ab. 320.

But acts of the Party after Coverture de-
termined amounting to a Confirmation may ratify
a Mortgage made during Coverture.

Perkins § 154
* Quere is it
not void as
in Not. 1 Term 145

In Chan. the Husband was decreed to
have the Mortgage discharged.

1 Bac. Ab. 41
12 Com. Dig. 264
1 Bac. Ab. 504
Dane 689.
2 Bl. Com. 98.

If the Wife's Estate be Mortgaged to se-
cure the Husband's Debt, his personal Estate
shall discharge the Debt & so it is
in this case if the Wife joins in a fine to se-
cure the Mortgage of her Estate and it becomes
forfeited, and part of the debt has been paid
and part has been advanced by the Mortgagee
on the same security the Estate will be holden
against the Wife for that also, for the Mortgage

that

Real Property.

Mortgages.

has the Legal Title and is must Equity to raise the Money out of the Estate as the 1st of the Lives shall be dead the Said Trustee the Legal Title shall prevail.

Though the Wife encumbers her Jointure in joining in a Fine to secure her Husband's debt she does not absolutely part with her Jointure for she may redeem and then her Jointure is restored to her — — —

1 Ch. Ca. 266 & 267.
1 Vern. 213

If the Wife joins in encumbering her own Estate to disincumber her Husband's she is considered in Equity as a Mortgagee upon the Husband's Land, and shall be indemnified out of his Assets.

2 Mk. 284.
Do. 384.

It is a Gen. Rule that if a woman holding a Mortgaged Estate marries and her Husband in consideration of her Portion makes a Settlement upon her he is considered as the Purchaser of her interest in the Mortgage and indeed the rule is the same with regard to Mortgages as to Sums in action. Both shall go to his representatives.

2 Vern. 30.
Eq. Ca. Ab. 68.
2 Mk. 248.

But this rule does not hold in case of a voluntary Settlement made after Marriage, and it has been decided that a Settlement after marriage in consequence of an agreement before Wife's fortune is not a purchase — for on the part there is no Contract she being legally incapable of consenting to the agreement.

Pas. 53
2 Mk. 248.
244.

Mortgages.

Real Property

Pur. & Ca. 63
Eq. Cas. Ab. 78

And thus a Settlement though before marriage is extorted to be only in consideration of a particular part of the wife's fortune it will not be considered as a purchase of any other than that which is expressly named &c.

Pur. & Ca. 312
Eq. Cas. Ab. 79
Gilb. Eq. Cas. 79.

So in all those cases an executory agreement to make a Settlement on the Wife &c. in consideration of her portion (or fortune) will be considered as a purchase of it. Though the husband dies without making the Settlement provided the husband is in no default in not making it &c.

1 Vern. 68.
2 Freem. 17
Eq. Cas. Ab. 68.

But if the Settlement falls short of the stipulated value in the above case it will not be regarded as a purchase of her Fortune &c.

But without any Effect the Husband is entitled to the Wifes Mortgage as well as her Chose in action provided he reduces them to possession during Coverture. For a Mortgage is in the nature of a Chose in action and with regard to them it is the Rule that they become his if he reduces them to possession during Coverture as by collecting them or assigning them for a valuable Consideration &c.

Pur. & Ca. 312
2 Vern. 301.
1 Ch. Ca. 258.

2 Vern. 170
2 Vern. 401.
Pur. & Ca. 718.

But a voluntary assignment of the Wifes Mortgage is not sufficient them to possession within the rule. The Assignee therefore shall not claim than the Husband would have had provided he had done nothing about it &c.

Real Property —

Mortgages.

If the condition of the Heir at Law be to claim possession of the Wifes Mortgages, so that she can have no relief in Equity, Chy will not interfere to take it from them. — 1 P. Wms 458 3 Dr. 197.

Or the other hand if the Wife claim possession of the Mortgage Deed, so that the Heir at Law or Creditors have no claim upon the Land at Law, Chy will not take it from her. — 1 P. Wms 382 Dr. 459. 2 P. Wms 316.

But Equity will interfere in favour of a Specific Legacy, and compell the Wife to yield to him the claim, provided such Legacy be for a valuable consideration for the Equity, and is not equal to the Mortgage. — 2 Vern 270.

Also a mere agreement by the Husband to assign the Wifes Mortgage to some real Debt of his own with delivery of the Mortgage Deed at the time of the promise is good, and the Wife from what Fund Mortgages are to be discharged, be on the death of the Mortgagor. — 2 Atk. 207 3 P. Wms 364.

It is a Gen. Rule in Equity that the Fund which has been encreased by contracting the Mortgage Debt, shall be in the first place applied to the discharge of the Mortgage.

Hence on the Death of the Mortgagor his personal Fund is first liable to discharge the Estate in favour of the Heir, and the — Salk. 449. Ca. Ab. 54. 3. Gilb. 520.

Ex.

Mortgages.

Real Property.

3 Ch. Ca. 258. Equities in such a case of the Heir shall be considered
Sug. 5th Ed. 91. allowable to advance redemption money in his
1 Ves. 6 Ves. 360. favour.

And the Heir under this circumstance
Supra & is liable to be sued when the bond for which is given
Sug. 5th Ed. 369. to the Mortgagee since he may exhaust the Estate
in payment of the Debt

Sug. 6th Ed. 477 The same rule holds in favour of the Mort-
1 Atk. 487. gagor Devisee of the Eq. of Redemption for a Devisee
is a favourable Heir.

It is said that if the Mortgagor bequeaths
Sug. 6th Ed. 61 his personal Estate among his Relations it will
Sug. 6th Ed. 477 thereby be applied to the payment of the Mort-
Talbot 34 gage. But Mr Godolphin thinks that the
2 Vern. 701. rule extends only to the residuary Legatee
(and not specific) and with this Limitation it
coincides with Powers of contracting debts es-
tablished when will soon appear.

1 Vern. 5. 1. But the rule prevails only in cases where
the Testator has not directed otherwise

And though the Mortgagor charges his
real Estate (in his will) with the payment
Eq. Ca. Abr. 271 of Debts not this will charge it only in the
1 Vern. 51. event that the personal Estate is insufficient
1 Ld. Raym. 203. But if he devises his real Estate to be sold
1 Vern. 718. for the payment of his Debts then the personal
Sug. 6th Ed. 451. Estate is not liable and shall not be charged
3 Ves. & Bea. 71 with the payment of the Mortgage

Real & Property.

Mortgages.

But this rule that the personal Estate shall be applied to discharge the real Estate is never allowed to stand in favour of the Heir to the prejudice of simple Contract Creditors and Genral Legatees. for in case the Creditors shall demand Debts upon the real and personal Estate. shall be to take their security on the latter (to save the Heir or for their better convenience this fund being easier of access.) yet the Heir will not be benefitted thereby, to the disadvantage of simple Contract Creditors and Legatees but they will be entitled to stand in the room of Specialty Creditors and to come upon the real Estate, to as great an amount as the personal Estate has been taken by the Specialty Creditors.

Fonb. 377. 87
Talbot. 53
1 Vern 693
2 Ch Ca 4. 5

The same rule holds against the Mortgagors Devisee. as against his Heir, (i.e. as a Contract Creditor shall have is meant against any Devisee.

Salk — 53
Com. Dig. 5 378

If the Testator devises his real Estate specifically to one and dies leaving debts and Legacies and the Creditors sue might come upon the real Estate, come upon the personal, if that should be exhausted the Genral Legatees cant come upon the real Estate for so much as the personal Estate falls short by the payment of the Debts.

1 Vern 371
678. 403
Com. Dig. 379
382. 384. 391.

Genral

Mortgage

Rule Regula.

Because a general Legatee shall never take from a Specific and for the same taken real and the personal property under the last Will and Testament of the Testator

A Devise of all a man's real Estate is considered as a Specific Devise. and both the real and personal Estate be specifically devised they shall contribute equally in discharging Debts by Specialty and Simple Contract

Cowtly 382

When the descent between the Mortgagor and his heir at Law is broken and a Devise Salk. 416 is made to him. he will be considered as the 1 Ves. sen 201 Mortgagor Devised and take as a purchaser Ed. - 681. and if the Devise is specific will be entitled Pond. 1 367 285 to the benefit of the rule. But where no such an Estate devised to him to take as heir the devise is void and he takes the Estate as heir

But the heir at Law is never entitled to 1 Vern 693. the aid of the personal fund in payment of Mortgages against specific Legatees.

Much has been said of the different kinds of Legacies. It may not be indispensable to mention that a specific Legacy is one which is so specified as to be distinguishable from all other goods

10 Ves. 64. 11 Ves. 398 11 Ves. 10 sen 127 539, 692. 28 Beav 11 332 Sa. Ca. 367 388 391

This Money or ordinary Cash may be specifically devised

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Mortgages.

A General Legacy, is one when the subject is not specified and yet is not void in any, as if A bequeaths to B 1000 £. a residuary Legacy, is when one is appointed to take that remains after particular sums & certain distributions have been made from it, as in case one is named to receive what remains after the Debts and Legacies paid. Authorities supra. Lee

If the Mortgagor devises his Estate with the incumbrances thereon, and there is nothing further manifesting the Testators intention that the Devisee should take the Estate "cum onere" he shall be entitled to the personal Estate to discharge it. 2 Pr Wms 386. 1 Bro C C 356. D° 461.

And if there appears a clear intention upon the face of the Will that the Devisee shall hold the Estate discharged on the real Estate in the hands of the Heir shall be liable for this purpose for the Heir is entitled to nothing except what his Ancestor has not devised away. 2 Atk 424

If the Mortgagor sells or assigns his Eq Redemption, the Heir of the Mortgagee has no claim to the personal Estate of his Ancestor to discharge the Estate for him that fund has not been increased by the purchase of the Eq Red — but not diminished. Therein is the same as applied to the Mortgagees Devisee 1 Bro C C 107. D° 454 Radcliffe 410 D° 412

Mortgages

Real Property.

And upon the same principle if the Money upon the Mortgage be not paid by the Debtor the owner of the Eq. Red the mortgaged Estate itself shall alone bear the burden and the heir or Devisee cant discharge it at the expence of the Executor (&c.) of the personal Estate of the owner - even though the owner by his Will charges a specific part of his property with the payment of his Debts and of the heir at Law declaring as his will that the heir shall not have the aid of the personal Funds.

1 Bro C.C. 454
D.o - 58.
1 P.C.W.m 347.
2 Ath 412

Interest on Mortgages.

The Law of Usury has nothing in it peculiarly applicable to the subject of Mortgages but there are certain rules growing out of it which will make it necessary to notice the rules that have been established with regard to the subject of Interest.

In England under the Statute of Anne, interest is fixed at 5 per cent per annum.

Throughout New England it is 6 per cent. In New York 7 per cent.

The reservation in a Cond. of reconveyance on Mortgage of more than lawful interest renders both the interest and the

1 Ves 2253
Dey 223

Contract

Real Property

Mortgages.

Contract void. — But Cobly receiving more than lawful Interest & there was no. corrupt agreement at the time of making the Mortgage will not affect the contract but only subject the party to the penalty of the Statute. — — — — — —

3 Atk. 154
2 Mod. 307
2 Rep. 241
3 Rep. 539
7 Rep. 184
3 Atk. 727

But a contract which is not usurious when made will not be rendered so by any subsequent agreement.

3 Atk. 154
2 Mod. 424
1 Vern. 428.

It was holden by Lord Hardwicke that if a contract was made in England for the mortgage of a Plantation in the West Indies no more than legal interest in England should be paid though the sum so secured did not exceed the legal interest in the West Indies. — —

3 Atk. 154
& Authorities cited

This position Mr Gould thinks might or might not be correct according to the circumstances of the case for if the Contract though made in England was to be performed in the West Indies it would seem from analogy not to be corrupt. if Lo Loan it was to be executed in England where it was made it would be usurious.

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There is in Eq. an extraordinary distinction taken between a Mortgage reserving 4 per cent. with a clause increasing the

Mortgages.

Real Property.

The Interest to 5 per cent if not punctually paid and a Mortgage reserving 5 per cent with a clause reducing it to 4 per cent provided the payment be punctually made.

3 Atk 220.
2 Vern 316
Do 284

The latter in Ch[y] is good & the former is void and will not be enforced.

This distinction is perfectly nugatory and can be accounted for in no other way than from the abolition in Ch[y] of Ch[y] entirely & penalties. The effect of the two clauses is precisely the same. The only difference consists in the phraseology.

But see if the Mortgage is drawn for 4 per cent and the Mortgagor executes a Covenant that it shall be increased to 5 per cent such a Covenant is good, and Ch[y] will not relieve against it. This is a distinction without a difference. say[d] Cases

3 Atk 101 n.1
2 Vern 134
Mosely 234

Such a Clause in the condition for raising the Interest from 4 to 5 per cent is good in Ch[y], if it be granted by the debtor for an indulgence or favourable consideration by the Mortgagee or prolonging the time of payment. Such additional Interest is not being considered as a penalty, but as a liquidated claim or satisfaction fixed and agreed on by the parties for the advantage which the Mortgagee foregoes

3 Bro C C 168
1 P Wms 652

Real Property

Mortgages.

Compound Interest is regularly not allowed between the Mortgagor and the Mortgagee either in Law or Equity. . . . Pre Ch 37/115. 2 Atk 331. 1 P Wms 652.

Subsequent acts of the parties may convert the Interest into principal. . . .

Thus if the Mortgagee assigns his interest in the Mortgage with the consent of the Mortgagor all the interest in arrear at the time will become principal in the hands of the Assignee because it is a contract between the Mortgagor and his Assignee to do so. 2 Ch Ca 67-8. 1 Vern 169. 2 Vern 135. 1 Atk 174

But this assignment to give title to Compound Interest must be made with the commencement of the Mortgagor otherwise the Assignee takes it as it is in the hands of the Mortgagee. 1 Vern 168. 3 Atk 371 or 2 Atk 174

But if the Assignee has not actually paid the Money Interest as well as Principal due at the time the Mortgagor will not be confined upon a compound Interest for the Assignment may be made colourable done with a design only to load the Mortgagor with Compound Interest. 1 Eq Ca Ab 329.

When the Mortgagee assigns and states an account with the Assignee this account will not include the Mortgagor or bind him. 1 Vern 168. Pre Ch 116. M Ag 226

Mortgages
35

Rec[d] Forfeiture

It was formerly holden that after the Mortgage was forfeited the Mortgagor could not redeem without paying Cobthbound Interest but this rule is now exploded. ——————

Sw[t] 6 Ca[s] 500
3 Atk[s] 742
1 Ves[r] 478
Do 480
Do 453
Do 370
2 Eq Ca Ab 330
Bro Ca Cp 202-6

The relief of a Master in Ch[y] consists in Interest and punishing a tenant for 11 pay should be convert the Interest into Principle from the time when the report is confirmed by the Chancellor.

5 Bro Pa Ca 430
2 Ver[n] 392
Lut[n] 1 840
Foley 25
R M[y] 432

But a Mortgagee against an Infant in like case will not convert the Interest into Principle because it is at any time made punishable only on the ground of the Mortgagors non performance of his Contract by way of punishment for his neglect but an Infant is not liable for that neglect &c ——

7 Bro Pa Ca 447
Pr. M[y] 434

But if an Infant is plaintiff in Ch[y] for a right to redeem he is on an account being taken by the Master subject to Compound Interest for he that would have Equity must first do Equity.

And it has been holden that if an Infant

Powell 437 8
12 Eq Ab 287
1 Vern 315

agrees to pay Compound Interest in consideration of a benefit which he consequently obtains for such agreement he shall be bound by such agreement and pay Compound Interest.

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But though a subsequent agreement between the parties will convert interest into principal as to the Mortgagor merely signing an account admitting a certain Sum due on Interest, that will not bind him as to the principal, (i.e.) does not subject him to pay compound Interest. For in order to this there must be some judicial act or the report of a Master, the Chy or an agreement between the parties, and that in matter of Account.

1 P.W.m 652.

An express agreement at the time of making the Mortgage (or any time before Interest is due) to convert the Interest into principal will not be enforced for it is deemed oppressive.

Salk 449
2 Atk 331.

When Money is expended by the Mortgagee in Reparation in defence of the Mortgagors Title it may be added to the principle and draw Interest.

3 Atk 518.

It has been observed that Tenant for Life of an Eq Red. is compellable to keep down the Interest during his Life

16 Ch Rep 223
Powell 121 442
Gilb Eq Rep 59

But a Tenant in Tail of an Eq Red. in Reversion cant be compelled to keep down the Interest by the remainderman or reversioner neither can his representatives after his Death.

2 Eq Ca Ab 596
3 P.W.m 235.
1 Vern 477-80
3 P.W.m 285.

be

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be compelled to do it, for in this case Ch. of Law as well Equity, consider the reversion as wholly in the power of the Tenant in Tail, as he may at any time by levying a Fine or suffering a Recovery, cut them off forever.

Pow. Mg. 443

But if a Tenant in Tail of an Eq. Rd. is an Infant and in possession by subpoena the Guardian will be punishable to keep down the Interest during the minority of the Infant because the reason in the former case does not apply, for the Infant cannot bar the remainder-man or reversioner until under the King's Privy Seal, which is never granted but upon application to change the rights of the parties but only in case of family settlements.

1 Vern. 477
Do. 480
Salk. 307
2 Atk. 227
3 P. Wms. 235
R. Mg. 444

But if the Tenant in Tail does keep down the Interest though he may not be compellable to do it the remainder man shall have the benefit of it, and may be compelled to reimburse the Interest paid.

1 Vern. 477
1 Ch. Ca. 218

If the first Mortgagee refuses to foreclose and sue the Mortgagor to receive the rents and profits without keeping down the Interest, the second Mortgagee shall not thereby suffer but as he is Entitled to the Surplus rents and profits received by the Mortgagor shall be applied towards the Interest and Principal of the second Mortgage,

Pri. Ca. 130.
1 Vern. 270.
3 Bac. 638.

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The last rule must be taken with a qualification for the Mortgagee in Fee is not compellable to account for the rents and profits untill he has notice of the claim of the second Mortgagee. — &c

When the Mortgagor gives the Mortgagee a Bond for the Debt, and a person to whom the Mortgagee entrusts the Bond has a right to receive the whole Debt and discharge the Mortgage. — Salk. 158. 1 Vern. 130. Fin. Ch. 209.

But on the other hand the holder of the Mortgage Deed, if he has not evidence of the Debt, has no authority to receive more than the accruing Interest, for delivering up the Deed does not prevent the Estate in the Mortgagor, the Debt being the principle, and the Mortgage but the incident. — 1 Eq. Ca. Ab. 145.

If the Mortgagee after the Mortgage is forfeited refuses to receive the Debt & then tenders to him by the Mortgagor he loses all claim to the Estate, after the tender for keeping the Estate in his own hands. — 1 Eq. Ca. Ab. 318. 2 Vern. Ch. 545.

But in England this rule has a positive qualification for if the Mortgagor would on all occasions to the benefit of the Tender he must give six Calendar months notice that he is about to make such a tender, and it must be made

on

Mortgage.

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on the case of the determination of the relation the same rule extends to the Mortgagee's representation

2 Ves. jun. 378. In the above case the Mortgagee must
9 Ves. 206. make oath that the Money lent was a bona
Ridg. 405. fide debt made for the Mortgagee, and that he
2 Wils. 378. has made no use or profit of the Estate which may be controverted by the Mortgagor

2 Vern. 372. In General to entitle the Mortgagee to the
Dict. 678. benefit of this Tender it must be made legal
3 Atk. 370. 2 Eq. Ab. 603. To this rule there are Lawful exceptions.
12 Mod. 316 and a Tender of Bank bills is good unless
3 Bac. 655. the Mortgagee makes no objections on this account & did in case he did that the Mortgagor ought to exchange them &c.

2 Ed. 6. 10. 6 10 The Money due upon the Mortgage (unless
1 Ves. 3. 210. 6) only Goods is regularly to be tendered to the person of the Mortgagee where there is no place appointed for payment. a Tender thereof upon the Land the Mortgagee being absent is not good (as a Tender of Rent would be)

But if a time and place are appointed a Tender at that time & place only will be made to the Mortgagee whether the Mortgagee be present or not.

1 Atk. 21. 12. 5 Bac. Abr. 11. Tender C. If no time & place is appointed in the Deed and the Mortgagee just notice that he will

2 Ves. jun. 378. pay, at a particular time and place such ap-

pointment

appointment is good provided it be reasonable and there is no objection on the part of the Mortgagee - Mr Gould thinks that the objection of the Mortgagee would not have any weight in such case.

And it has been decided that where there is no plan appointed and the Mortgagee endeavours to avoid the Tender by keeping out of the Mortgagors way Tender at the Mortgagees house will good. 1 Ch. Ca. 20

If the Mortgagee has doubts as to the legality of a Tender he will be allowed a reasonable time to consult Counsel before which time his intents will not cause a Tender. 2 Eq. Ab. 603. 3 Atk^s 90. 2 Vern 458

It is laid down by Powell as a Genl Rule that the Interest fixed in a Mortgage may be altered by a subsequent parol agreement. How however Mr Gould thinks it is not. P. My^s 460. & B. Pa. 6 580.

Method of Accounting.

A Mortgagee being only a pledge and not an alienation the Mortgagee has no right to the rents and profits until he take possession

The Mortgagor in possession is never bound to account for the 2 Atk^s 107 3 Atk^s 244

Mortgagee. Real Property.

Dan's 66. the profits during his possession.

But on the other hand the Mortgagee
2 Mth's 534 in possession must account for the rents
1 Vern 476. and profits during his possession and they
must be allowed for the payment of the debt

When the Mortgagee in possession man-
ages the Estate himself he shall be allowed
but the amount only his expences of receiving
1 Vern 316 the profits but nothing by way of remune-
2 Vern 120 ration. For he cannot be a bailiff to the Mortga-
2 Mth's 120 gor, and even if there is an agreement that
3 Mth's 518 he shall have a salary it will not be en-
forced. For it is deemed oppressive as the Mort-
gagor is considered to be in the power of the
Mortgagee. — But if the Mortgagee employ
a Reputable bailiff a reasonable sum will
be allowed him as a compensation

If the Mortgagee in possession assigns to
1 Ca Ch Pr 328 an Insolvent person without the consent of
3 Bac 638 the Mortgagor he shall be accountable for the
2 Ca Ch Pr 3 profits after such assignment

When it is said that the Mortgagee is ac-
countable for the rents and profits it is meant
1 Vern 45 that he is "prima facie" liable only for the
1 Vern 476 actual profits received and not for the an-
1 Ca Ch Pr 328 nual value of the Land or the utmost val-
3 Bac 637 ue of the profits which it is capable of producing

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If known the Mortgagee has been guilty of any fraud or culpable neglect for which he has made less than he might have done (as if he leases to one for a less sum than he is offered by another) he will then be liable for the annual value.

16 Ves 258.

It is a rule in accounting that if a Mortgagee at any time has rented the land then shall for which he lets it shall in favour of the Mortgagor be considered as the annual value during the whole time that it was in his possession. This presumption may be rebutted by the Mortgagee.

If the first Mortgagee takes possession and thereby keeps out the Creditors or Incumbrancers (provided he had notice of such subsequent Incumbrances) he shall allow the whole amount of profits which he might have received in favour of the after Creditors.

1 Vern 270
Pre Ch 730.
3 Bac 638

So if the first Mortgagee suffer the Mortgagor to remain in possession as against subsequent incumbrancers the Mortgagee will be chargeable with the profits from the time when the subsequent Incumbrancer would have had a remedy had it not been for his intervention (or from which he has kept them out of possession). For Equity will not permit a man to make use of his own securities to protect

1 Vern 267.
3 Bac 638.
Fell Mg 464.

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protects a debtor from the just demands of his creditors.

When a Mortgage has been assigned by the Mortgagee he must be made a party, in a Bill of Redemption, that he may account for what profits he has in his time. ---

1686 Feb 6 59
2 Dº ... 393.
R. Mg's 471.

It is laid down in Sage's that where there are several Mortgagees an account stated between the Mortgagor and the first Mortgagee will bind the rest if that account was fraud or collusion. The authorities however don't support this & it is said to be unreasonable

1666 Feb 209
2 Dº 32
3 Bac Abr 639
1686 Feb 172
R. Eq's 471.

An account between the Mortgagee and his assignee will not be concluded against the Mortgagor. ---

1666 Feb 108.

But in the account between the Mortgagees a remote assignee after a number of successive assignments is not bound to account for the profits which accrued before his own time unless before he comes into possession and it is left with the discretion of the Court to determine when the assignments are sufficiently numerous to exempt from accounting.

1666 Feb 102
2 Ch Ca 392

The reason of this rule is because in such a case it is difficult to take the account and the Mortgagee only is in fault by delaying to redeem.

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There are two methods of accounting. The first is the, that are called annual rests, (i.e.) that the rents and profits greater exceed the interest. the surplus is applied to sink the principle. —

The second is by collecting all the future rents into one aggregate amount and all the rents and profits into another. ——

Either of these modes may be adopted in Chy according to the circumstances of the case

The former is the most profitable and consequently the most common method. in cases where the profits greatly exceed the interest. — but it often attended with great hardship to Mortgagees, especially where the sum is large. The Mortgagee is bound to enter upon the Estate. and then can satisfy his debt only by the profits. and he dare not. it being left to the Mortgagor. and is bound to account without any salary. & the Court will not therefore (upon bare suit of Interest) apply it to sink the principle. but will adopt the other method. ——

2 Atk's 534

Foreclosure.

In Chy will a fine of forfeiture differ from Redemption in favour of the Mortgagor. so it will differ a —

Foreclosure

Mortgages

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Foreclosure in favour of the Mortgagee.

A Decree of Foreclosure is an Order of
1 or 2 Ch. Ca. 98 a Court of Equity that unless the Mortgagor
Do. (or) Do. 198 shall pay the Debt and Interest by a time
Rep. Eq. 475. appointed in the order he shall be foreclosed
and for ever barred of his Equity of Redemption.

Where the Estate Mortgaged is a re-
Rep. Eq. 475 versionary interest Chy will decree that
Do. 510. the Estate may be sold, and the money rais-
ed arising by the Payment of the Debt.

If there are several Mortgages on the
same subject, or by deed, the Mortgagee
1 Eq. Ca. Ab. 368. must also be made parties to the Bill of
Foreclosure. If known any one defen-
dant to join as Plff. he must be made De-
fendant that his rights may be known and
cancelled.

Chy will never decree a Fore-
2 Vern. 303 closure until a Mortgage is forfeited for
1 Vern. 332. before it has no cognizance of it.

On a Bill to Foreclose the Title of the
Mortgagee cannot be investigated, even
2 Eq. Ca. Ab. 244. meaning that a Court of Equity will not aid
Rep. Eq. 476. the Mortgagees Title if in any way defec-
tive, but leave him to his remedy at Law.
For Chy on a Bill for a Foreclosure can go
no further than to take the right of redemp-
tion.

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The Mortgagee may found all his remedies against the Mortgagor at one and the same time. and the pendency of one suit is not pleadable in abatement of the other because they have a different effect.

Eq^ty may and will refuse to decree a Foreclosure when the Mortgagee is taking an unconscientious advantage of the Mortgagor or where a manifest injustice would be the consequence to the Mortgagor

2 Atk^s 344
2 Vern^s 271
Salk^d 686.

There is what is called a substantial or implied Foreclosure though they are not to in form as when the Mortgagor brings a bill to redeem and an account is taken before a Master in Eq^ty and then is ordered to pay, then if the Mortgagor neglects to pay within the time limited the Court will dismiss the bill and he is then forever barred. for he has abandoned his right.

2 Atk^s 246.

If the Mortgagee sue brings a bill to foreclose without joining the Executor or personal representatives. it is demurrable because the suit does not concern the property it is personal Estate. and in this case the Chancellor will "ex officio" dismiss the bill even if true it is no demurrer. for though true it is no demurrer since the rights of the third person affected

16 Viner 51
2 Eq. Ca^s Ab. 29
M. Eq^s 179.

Mortgages.

Reals Ejectment.

In a bill to foreclose the equity of redemption, to
3 Pr Wms 333 n. make the Executor or Administrator of the Mort-
Powell 479. gagor a party. Though the Mortgagee has
not no right to foreclose yet if this may never
be but obtained as it is good against the Mort-
1 Vern. 367. gagor and binding on the Executor of the Mort-
2 Vern. 66. gagee. For if a Tenant and the Executor of the
D° 193. 369. Mortgagee should come against the heir to
18 Ed. 6. B. 328 have the benefit of the Mortgage. the heir in
case the Land is worth more than the Money
may if he please pay the Money and retain the
benefit of the Foreclosure to himself. or if he
please it may convey the Land to the Executor.

On a Bill to foreclose within a certain
2 Ed. 6. B. 60 s. number of Months. the computation is by
Calendar. and not lunar Months.

A Bill to foreclose a Tenant in Tail
16 Ed. 6. f. 217 of an Eq. Rd will bind not only the Issue in Tail
Powell 481. but the remainderman. though they are not
parties to the suit. because they are in the
power of the Tenant in Tail.

But a Bill against a Tenant for Life
2. Ch. Ca. 401 does not bind the Remainderman unless he
be made a party to the suit. because he is
not in the Tenants power.

If there are several Incumbrances
and -

Real Property — Mortgages.

and the first Mortgagee wishes to obtain a complete Title against all the rest they must all be made parties to the Bill and he can obtain a decree only against those who are made parties and the Equity of those who are omitted remains &c

2 Vern 185
Do — 518
Do — 603

If the Mortgagee devises away his interest the Devisee alone may maintain a Bill to Foreclose without making the Mortgagor himself Equitable party to the suit

16 & 17 Car 2 33.
1 Eq Ca Ab 318.

A decree of Foreclosure may be obtained against an Infant not hereafter without giving him a day in Ct to shew cause why he should not be foreclosed and this day in Ct includes six Calendar Months after he attains full age

3 Wilson 352
1 Vern 295
2 Vern 342
Do — 392
Do — 479
Pre Ch 185.
1 Peere 365
2 Peere — 93
3 Atk 712
3 Bac 148
2 Atk 532
1 P Wms 504
2 P Wms 401
3 B & P 311.

If when the Infant does not within six Months after he attains to full age shew any cause to the contrary the Decree becomes absolute. If however he shews cause he may upon motion put in a new answer and make a new defence for it would be to no purpose to give him a day to shew cause if the Infant was notwithstanding concluded by what his Guardian had done. He may have made an improper defence or mistaken the nature of it.

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But must not be inferred from this that the Infant can have the Deed set aside
3 Ves 352 merely on the ground that he was an Infant when the Deed was executed
K Ely 489 but the case will be open for the Deed would be
prima facie voidable. But he will be permitted to shew that the Deed was ex-
tended to his injury that the Deed was ex-
tended to his injury that he may take advan-
tage of such circumstances as if shown at
the time would have prevented the Deed.

According to this made at Boundary Price
3 Mon 369 must be a Bargain & Sale made when the Infant on
3 Bac 148. his coming of full age. This is in the nature
of an Estoppel.

If a Feme Covert on her marriage
mortgages Land and the Equity vests in her de-
3 Ves 352 vising Executors the Power of Foreclosure is Pro-
2 Mk 712 prietary, and she has no dower given her in Eq.
1 Dan 364 to subsist against the Mortgagee. Except
Hobart 95. where there has been some fraud practised to obtain
the Deed as in the collusion of her husband and
the Mortgagee. Or in such case "Mr Cowell"
thinks the will be heard against the Deed.

It has been remarked above that after a de-
cree of Foreclosure the Mortgagor is forever bar-
red of his Equity of Redemption. — Chancery
will however sometimes when a Foreclosure
after it has been enrolled &c restore to the
Mortgagor his Equity of Redemption.

Rule & Practice — Mortgagee.

If the Mortgagee has been guilty of any wilful or fraudulent Concealment in obtaining the Decree, the Court will open the Foreclosure — 9 Mod. 153 — 2 Ca. Ch. 200 — 2 Ba. Ab. 544

That where the Mortgagee obtained a Decree of Foreclosure pending a suit by the Creditors of the Mortgagor to have the Estate sold for the payment of their Debts —

So if a Mortgagee obtains a Foreclosure after a judgment Creditor has given notice of his demand and tendered payment of the Debt, Ch. 170 — 2 Vern. 601. will in such case open the Foreclosure —

When a Foreclosure is opened in favour of subsequent Incumbrancers they shall pay the first Mortgagee all his expences in obtaining the Foreclosure. — 2 Vern. 185

And as a Foreclosure may be opened after it is owned and before it is made absolute. So also the time of payment limited in the Decree before it has become absolute may under certain circumstances be renewed and enlarged — Finad. 10 Mo. 3 Ca. Rep. 221 — 2 Eq. Ca. Ab. 605.

That if the Mortgagee is prevented from payment by means out of his controul &c — 1 Ch. Ca. 63. — R. Eq. 494

But it is a Gen. Rule in Equity that a Foreclosure shall never be opened in favour of a mere voluntier (as a Devisee) because he loses nothing by the Foreclosure. — 1 Ch. Ca. 217. 76 — 2 Ch. Ca. 317 — Do. 605.

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1 Vern 406
Pus Ch 423
1 Br P Ch 291
2 Vern 701

There can be no Foreclosure in a Welsh Mortgage because the Estate is never forfeited consequently there can be no Equity of Redemption.

1 Vern 148
2 Vern 235
Salk 248
1 Eq Ca Ab 495

Tho' a Foreclosure obtained by the first Mortgagee against the second the first Mortgagee devises the Estate to the Mortgagor the Deed shall be shewn in favour of the second Mortgagee against the Mortgagor. i e the rights of the second Mortgagee shall be secured.

23 Car 2 c 19
18 & 19 W 3 c 17
Powel 196. 505.

A Foreclosure may be saved by the act of the Mortgagee himself as by bringing an action to recover the mortgage Debt.

1 Vern 202.

It was once holden in Court that a Foreclosure could not be obtained after the Mortgagee had taken possession but this now is not the Case.

1 Br P Ch 414
2 P Ca 111. 3 P Ca 315.
2 Eq Ca Ab 177
Do ... 379

As a Gen Rule when the Mortgagee has acquired for twenty years in a Foreclosure it will not be opened.

Powel 479
Do 502

In England if the Mortgagee does not pay the Debt by the time limited the Foreclosure is made absolute by another order.

In Court the first Decree is moved absolute of course if the Money is not paid at the day, because here they Courts sit only at particular stated periods but in England the Courts sit at all times.

Finis.

1387

Real Property

Devised. — by J. Gould Esq.r

By a Purchaser in the Book is meant Land who is entitled to Real Property in any other way than by Descent.

The principal methods of acquiring an Estate by Purchase are by Devise by Deed and by Levy of Execution. —

A Devise is a disposition of Real Property made by a man to take effect after his Death.

The right of Devising existed among the Anglo-Saxons but was abolished at the introduction of the Feudal System. It was however preserved in some parts of England by local customs or by privileges granted by the Conqueror Term for 1000 years and Chattel interests were not effected by the Feudal system in this particular — being personalties.

The suspension of this right continued for many centuries between the reigns of Henry 2nd and Henry 8.

But the distinction was evaded by the doctrine of Uses. —

Devises.

Real Property.

By Stat 27th of Henry 8th this practice was checked this Statute transferring the legal Estate to the "Cestuy que trust" and thus consolidating them.

By Statute 32nd of Henry 8th it was enacted that all persons having Real Estates could in devise the same by Will. Copyholders should have power to dispose of two thirds of them holden in Chivalry and the whole of those holden in Soccage by Devise.

This Statute called the Statute of Wills was explained by 34th of Henry 8th.

Now all English Tenures except those of Copyhold are devisable. Further regulations as to the making Devises are made by the Statute of Frauds and Perjuries 29th Charles 2nd except that it extends the privilege further.

We have also in Canada a Statute similar to the clause respecting Devises in the English Statute of Frauds and Perjuries. Hence the construction given to this Statute is generally adopted.

The power of Devising in England as now by Stat 32nd Henry 8th explained by the 34th of Henry 8th

Powell 247
2 Black 376

The mode of Devising is prescribed by Statute 29th of Charles 2nd

Devises.

Of Devises under the Stat. of Henry 8th.

No particular form is requisite for Devises under this Statute. It is an inguious Instrument in Writing, without any particular form of words.

Any Instrument manifesting an intention to make a disposition of Land and having the formalities required by Com. Law will amount to a Devise under this Statute and such Instrument or intention is not confined to the rules of Com. Law, - as when the Instrument is in the form of a Deed and actually delivered as such. Doug. 377 Dawk. 123.

So a Devise may be written at different times and on different pieces of paper which will not be joined together and they are constituted but one Devise if so intended. Thus A by one instrument Devises Blackacre to one person and at a subsequent period he devises to another. He may Devise several particular distributions of several parts of his Estate as he may do in his Will.

In this case however the Instrument is not to be declared on as his first & 2d or several but particularly, as the Testator made his Will of such a part of his property. 1 Modern 187 Dawk 15 Do 105. 382 + Com. Dig 175 1 Bac. Ab. 558 1 Brown 96 Do 552 145 Dawk 18 6th Co. 58. 16th Co. 248.

So also he may make several Devises of different interests in the same Estate as a

Devises

Pawl 4 18. 4 Co 61 a 21. 1 Vern 187. A Devise of Land to the Testat. & young Son and his Heirs: afterwards the same Land is vested to the Testators Wife for Life having such a Trust to the Son. Both stands as if made in one Instrument for then is created a Remainder.

Pawl 4 19. 20 2 Mod 308. So also in the same Premisses a latter Instrument may modify a Devise made in a former one as it may diminish or annex a Condition to it.

Pawl 4 293 Alk 273 1 Ld Wm 230 1 Vern 228 Rep 117 Cokes 2 144. A reference in a Deed to another Instrument (as a Deed) for the purpose of explaining the contents of a part of the Deed that Devises Lands all the Recitall indeed in a certain Deed.

Pawl 26 1 Vern 187 2 Vern 268. So after a Will or Devise is made and published the Testator may make a Codicil explaining, altering or enlarging the disposition before made. The Codicil annexes the Codicil to the Devise and considers both as one Instrument.

By a Codicil is meant an appendage to a Will or Devise explaining curtailing or enlarging the former dispositions.

Nov 86. But a mere recital of something contained in another Instrument is not a Devise.

In the construction of the Statute of Henry 8th it was holden that no Devise of Land must be in writing, but the Judges took the word writing in its most extensive sense as

Devises.

at including loose acts memoranda and letters expressing the Devisor intention. — Crk Eliz 100 — 2 Bro C C 378.

Held it was holden that the writing need not be made or authorized by the Devisor / thus a Deed written by an Attorney in pursuance of instructions of the Devisor yet written in his absence and never read to him was good. — Powel 26 — Dyer 72

So it was holden if one "in extremis" had declared his intent to devise by parol to a particular person and another without any direction or authority had reduced it to writing in the Devisors life time it would be a good Devise. — Dyer 72 — 2 Noble 345.

But these two last decisions are doubted and overruled and it was holden that the Devise must be completely reduced to writing during the Devisors life time and by his direction or it is void. — Powel 26 — Rep 79. 113. — 3 Lewins 113 — Crk Eliz 100

When the Devisor devised several distinct Devises and after one was completed but before the other were he died the first was adjudged good. — Powel 29. — 2 Coke 31.

It was holden that a Devise might be good in part and void in part as where a Servance annexed a Condition to a Devise without authority the Condition was void but the Devise good. — Powel 29 — Dyer 72

But it is observed where time is a condition the devise or Condition and the Devise — 1 Noble 880 — Moore 350.

void

Devises.

was written without the Condition. Since the Devise is not written in the Testators Life time.

Powell 30. A Signing by the Testator is considered
1 Ld 7 362 unnecessary under these Statutes 32 & 34 of Henry 8th and his name need not appear on the
2 Levins 35. face of the Instrument.
3 Do. 79

And it was holden that any writing though not signed sealed or written by the Devisor was sufficient and that the evidence of one witness was enough to establish a Devise of Lands, but probably accepted the clause in the Statute of Frauds & Perjuries.

Powell 94 It was formerly holden that a contingent interest resting upon possibilities could not
3 Leo 427. be devised under the Statute of Wills.
Jeanes 291

Pow 34. 334 It is now clearly settled that Lives may
1 Bl Rep 232 be on possibilities coupled with an Interest be-
3 Rep 88. cause the interest rests are devisable but a
1 Ch Ca 30. mere naked possibility cannot.

But an Estate that is termed to a mere
Powell 38 right is not within the provision of the Statute
Ch Ca 93. 281. of Henry 8th as a reversion discontinued. — Ex.
2 Bl 198. Tenant for Life and a Reversioner in a Lease for Life. the reversioner cant devise the reversion for it is discontinued.

Pow 218. 36 An Estate "pur auter vie" is not
1 Roll. 334. devisable under the Statute of Henry 8th —
Ch Car 58.
6 Co Litt 51

for

Devises.

For they are confined to persons having Lands in Fee Simple. - So of an Estate for Natural Lives. — 2 Rolle 150 Keb. 480 1 Vern. 268.

So of a base Fee. a freehold descendible "per autre vie" - as if a Tenant in Fee grants to A and his Heirs. A cant devise this interest — Pawl. 36. Carter 208. 311 Popham 91 2 Dyer 353.

But now by Statute Charles 2nd Estates "per autre vie" are devisable unless there is a Special occupant. — Pawl. 37. 2 Blk. 259.

Our Statute authorises "Devises of Estates" "per autre vie." and all the Estates he might have transmitted during Life. — Statutes of Conn. 24

Dignities Franchises and Offices. though they may be descendible in England are not devisable — Pawl. 40-1 3 Coke. 32. 10 Coke. 87.

Copyhold Estates in England are not devisable with the Seal of Henry the 8th. — Paul 10. 48. Woodeson 135

The right of reentry on Lands descending on the non performance of Conditions. is not devisable for he has not the Lands till the breach of the condition and this strictly speaking is no Estate in Lands. — Pawl. 46. Do 183 1 Vern. 233. 422.

Of the Devise or Instrument itself. —

The clause relating to this subject in the Statute of Frauds & Perjuries &c. of Charles 2nd enacts. that all Devises in Writing shall be

Devises.

be 1st In writing. — 2d Signed by the Devisor or by his consent & express direction in his presence
3d Attested & Witnessed in his presence. —
Jawk 47 4th by three Witnesses 5th by credible Witnesses.
The object of this provision is to guard men in extremis from fraud. —

In Devises no Form being prescribed by the Stat of Henry 8th any writing which would have been good as a Deed under that Statute will now be good if the Solemnities prescribed by the Stat of Frauds & Perjuries are observed. —

Here under the Statute of Henry 8th a Devise executed according to that Statute
Jawk 19. 48 may by a Deed to enrol such Instrument make it
2 Atk 308 a part of the Deed. Though the Instrument
2 Salk 278 referred to is not thus executed as if a Lease &
1 P. Wms 433 Devise & Feoffment executed under the Statute
3 Burr 1775 change his Land into Legacies and then by an Instrument not thus executed gives Legacies these Legacies will bind the Land

Jawk 503 The words of the Stat are "Lands & other
Ca. t. Eq. 1 estates." These words dont extend to a Legacy or
Ld Raym 166 a Chattle interest.

A Devise of an Inheritance
Jawk 48 made under a Power if made by Will must
1 P. Wms 760 be executed according to the Statute as if an
2 P. Wms 258. Estate is conveyed to A & Heirs to such Uses
2 Vern 175. as B shall appoint by Will. —

Devised.

A Trust of an Inheritance is within the Statute and cannot be devised but by an Instrument made according to it. — 2 Atk. 152. 2 Ca. Ch. 258.

By Will is meant such a writing as is proper for the disposing of Lands. —

It is a Genl Rule that a writing not having the Will if owned as such, must have Pawl. 58. an appointment for otherwise the mischief intended to be remedied by the Stat would ensue. 3 Vern. 597.

And if a Legacy is given originally out of Land, the Will creating the charge must be executed according to the Statute. Such a charge is in effect a distraction of a part of the Land by Devise and is different from the instrument referred to in a Devise. — Pawl. 58. 2 Atk. 255. 2 Atk. 268.

Rents arising out of Land are within the purview of the Statute. — Pawl. 59.

So a Will giving an Executor power to sell Lands must be executed according to the Statute for this is indirectly disposing of Lands or what is the same thing, enabling others to do so. — 2 Vern. 179. 1.

In England the Statute of Frauds extends to all Lands and Tenements devisable either by the Statute of Wills, by Will, or by the Statute of Frauds, or any other custom. —

Devises.

Of the Solemnities required in a Devise by the English and Connecticut Statute &c.

In 1st Place the Devise must be in writing. This requisite indeed obtains under the Stat. of Wills.

Powell 60. It is also necessary, under our Statutes, though the word "written" is not used, but the word "signed" seems to implie that it must be in writing &c.

Sealing though usual is not necessary.

Gan. Jur. 204. 2 Stg. 70 n. Powell 62 6. 3 Modern 2 n. 28 Geo 2 Ca. Powell 67. 74. 1 Willms 313

It has been held that sealing amounts to signing within the Statute. The same point is laid down in Ld Raymond. Mr Gould says that the contrary better seems to be the better opinion, as the former facilitates the forgery of Wills.

Powell 61 3 Levins 1 3 Mod 213 n. Ca. 6 Jac. 463

But the name of the Testator written by himself in any part of the Instrument is considered as a signing unless it appears that it was not so intended.

But if it appears that the name written in the body of the Instrument was not intended as a signing it will not operate as such as if there was an express intention to sign formerly and that intention was defeated. Thus where the Devisor the Will being in Court signed the two first but failed in his attempt to sign the third through weakness. The "omnes probandi" lies in this case on the person who affirms the Devise

Devises

The presumption of Law - the intent of the Devisor being certain is that the name written in the body of the instrument is a signing. Powell 353

A Devise subscribed in the Witnesses and declared by the Testator in their presence to be his Will though not signed by him was holden to be well executed. Vin. p. 53.

Judge Reeve thinks the Legislature intended that the Devisor should write his name at the bottom of the Will though not so construed by the Ct. In case of Witnesses this construction can do no harm but it is in some cases dangerous.

2nd A Devise must be attested and subscribed by three or more Witnesses. Powell 113.58

The general object of this clause is to prevent the frauds consequent on the secret execution of Devises.

The Witnesses are to attest three things 1st The sanity of the Testator. 2nd The fact of signing. 3rd The Publication. Tuesday being sent to ask the Testators sanity.

1st The are to attest the Sanity of the Testator. - for the signing which the attest includes not only the physical act of signing or writing the Testators name but also the requisite power or capacity of making a 3 P.W.m. 93-8 D° 169.

legal

Devisee.

a legal and effectual designation. ——

Judge Reeve says that the "creditor" will rest on him who attacks the Will after a lapse of time it is difficult to prove

2 Atk. 50. Salk. 284. Bull. 294. B. & Cl. 308. the Testators signals must be proved the court presumed well on the Decease. — Leaving the question to have been formerly not sufficient.

Hence a Wife will not establish a Devise unless all the attesting witnesses have been examined for the Devisee has a right to resume what was given all of them.

3. P. Wms. 343. Bull. 294. Sharpe 1000 But the testimony of the subscribing Witnesses is not conclusive as to the Testators Sanity. — Judge Reeve says that the Witnesses can not attest the Testators Sanity though the Broker can so far as may be called upon in Court to attest his understanding. — —

2nd They attest the Devisors signature.

2 Atk. 182. 3 Leon. 7. 2 Ves. jun. 606. 2 Vern. 455. 488. 3 P. Wms. 283. 2 Dall. 202-44. Dall. 71. Bac. Ab. 284 (It is not necessary that the Witnesses should actually have seen the Testator sign if the Devisee acknowledges his signature in their presence it is sufficient.

Ld Mansfield says that a written declaration in the hand of the Devisor that his name was written by himself is sufficient evidence to a Jury of the fact of signing

Dall. 78 3 P. Wms. 286. it is an implied acknowledgement. Quere is not an actual acknowledgement necessary? — —

Devises.

3dly They are to attest the publication.

A publication was necessary before the Statute of Frauds and is not taken away by it. — It is analogous to the custom of delivering Deed

By a publication of a Will is meant some act of the Testator amounting to a declaration that the Will is his — no particular form is prescribed. Powell 80 3 Mod 156 Powell 81

Any act or declaration importing a solemn intent of the Testator to dispose of his property by the Instrument is sufficient. 1 Vince 125 Powell 81.

Hence delivering an Instrument as a Deed is holden to be a publication, and this was so done in a case where the Witnesses were deceived and subscribed it to be a Deed. ——— So declaring to the Witnesses that this is my last Will and Testament is sufficient. —

And a publication may be inferred as where the form of attestation was in the hand writing and in the words "signed sealed and delivered in the presence of &c and he said to them" take notice." Powell 823

But it seems the publication must be in the presence of three Witnesses at least & this number is necessary in a republication.

Of the Witnesses subscription. —

It is holden that if the Will is written on the

Devised

Cas. Hen. 37
2 Mod. 210
Powell 89. 90
3 Burr. 1748
1 Do 1748.
Jarman 486
Cas. Ch. 180
Carth. 483

on three sheets of paper and one Witness subscribes each. it is sufficient.

So if the sheets are wrapped up in a blank paper this subscription on it is said to be sufficient.

2 Show. 377

In the presence of the Testator. These words are held synonymous with "within the view."

Salk. 295
Do 398. 688.
Carth. 201
1 Eq. Ab. 403 pl. 9
Do Chan. 99
Carth. 49
1 Show. 89
Do 288.

If the Witness subscribe within the view of the Testator it is enough. By the word View is meant Possible view. for if the Testator might have view of the Witness when subscribing the subscription is in his presence tho' the curtain of his bed is closed if the subscription be in the same room. It is sufficient that the Testator could if he wished it see them subscribe

Powell 92
Carth. 90
Comyns 156
1 Peere Wms 239
Mason 84

But the subscription though in a contiguous apartment is not good unless the Testator might have seen it

Powell 86-8.
Show. 288.
2 Vern. 347
Doug. 232.

And though the Witness retires to subscribe at the Testators request the same rules obtain for this clause it seems was introduced to prevent all mistakes as to the identity of the Instrument

Doug. 299.

If the Testator is insensible at the time of the attestation. though corporally present the attestation is not good The presence implies mental presence

Devises

If the Testator is where he might see the Witnesses but they manage clandestinely to sign it. while he doubts whether to finish the execution or not it is void. 1 P. Wms 740 Page 695

Though the Witnesses must subscribe in the Testators presence yet the fact that the subscription was in his presence need not appear on the face of the Instrument; it is a fact for the consideration of the Jury — and indeed if it is stated in the Instrument it must nevertheless be proved. If the Witnesses are dead the Jury may presume the fact. 1 Vern 128 Powl Devs 68. Cas Ch 831 Butl 363. 2 Eq Ca 109.

By three or more Witnesses. under this word it has been determined that if a Devise is signed by A and B. and afterwards a Codicil by B and C. the Devise is not signed by three Witnesses within the statute — So if the Devisee be not witness the Codicil with three Witnesses will not make it good. Powl 680 Cas Ch 35 Hobart 10 Holt 702 Com Dig 174 3 Mod 262 1 Shawn 68 2 Vern 594.

Quere as to the principle. — it does not appear except in one case that the Devisor was present when the Codicil was made. Powl 114

The distinction between a Devise and a Codicil appear to be the ground of the decisions. Powl 108-9 1 Burr 565.

If a Devise be made at several times and in several distinct parts the attestation of one part is sufficient. but it may be asked what is the difference between a Codicil and

Devises.

and Devise constitute but one Instrument.

A Codicil however is intended to effect an Instrument already made and complete - not to command to give, validly. The attestation of the Codicil therefore Powell 080. 2 Vern 297 is not attestation as to the original Devise but an attestation of one part of a Devise it is intended to give an authority to the whole. —

But where there is a Will and Codicil on the same piece of paper the question whether Powell 108 the subscription belongs to and authenticates both is determined by the Jury.

And as to the question whether a subsequent writing is a Codicil or distinct part of the original Devise it seems that if the 2 Powell 109 subsequent part relates to personalty only and 1 Bac Ab 554 is executed according to the Statute, this circumstance furnishes presumptive evidence that it was not intended as a Codicil. —

It is not necessary that the witnesses should subscribe in each others presence or at the 2 Atk 177 3 Burr 1748 2 Vern 249 same time. But it is usually safe for the Prec Ch 184 2 Ch Ca 109 Powell 161 4 Burr 2224 Burr 264 Powell 708-9 12 Mod 564 1 Salk 184 1 Bl Rep 1035. oath of one Witness is sufficient to prove that all signed it in the presence of the Testator But unless all are present proof cannot be thus made: and if one only is living the handwriting of the others should be proved. In such case proof could be had that the Witnesses

signed

signed it in the Testators presence unless
were present together.

Judge Reeve thinks the Will and the
Codicil one Instrument. — Powell 708-20
1 Wms 140.
1 Vesey 174.
Powell 570.

Judge Reeve thinks that if the Devisee
is identified in the Codicil that the Witnesses — Prec Ch 270.
on it present when the Codicil is exe- — 2 Vern 287
cuted it will be good — Comp 3 Rep 284

The ground of decision on this subject
is that the Witnesses to the Codicil must
identify the Will. — If the Codicil is writ- — 1 Burr 548.
ten on the same piece of paper it is good.

Credible Witnesses. This expression
is not in the Statute — Powell 133
The word "credible" seems here to want mean- — 1 Bacon Ab
ing. for the credibility of a Witness is never en- — Burr 417
quired into. — If it means "competent" it is
necessary. for competency is implied in the
word "Witness".

It has been decided that a — 12 Mod 277
Devisee is not such a Witness as the Statute — Ed Ray 505.
requires. and clearly so as to his own Devise — Freeman 510.
for he who is no Witness cant be a credible one. — Carthew 514
Powell 114.

This rule extends to interested Witnesses gen-
erally. — Though he is a good Witness as to the

other.

Devisees

of the Devisor in the same Instrument

Stry. 1253. So double Bills, Bonds or Bonds jointly by
Paul. 116 Crimes can't be Witnesses, or lastly that they subscribed
as Evidence before attestation the Witness was con-
victed of Forgery

Question. If the Witness thought indebted
ed at the time of the attestation is com-
petent to testify, if the time of examination
can the Devise be established. It is well
executed? It was holden that if could
not be Chief Justice Lee. that the Witness
must be competent at the time of attestation.

Paul. 113 The Statute of Wills had an enumeration
Stry. 1252 ded on the Lands unpreferred an interest
Paul. 110-17-20 subsisting as in the case above alluded to. This
1 Vern. 503 case was carried to the Exchequer Chamber
there was a difference of opinion and the case
was compromised.

This question has been de-
cided directly in favour of Devise under
such circumstances. The Witness to a
1 Bac. 414 Devise are all Creditors and the Debts char
Prec. 104 ged on the Land. but as they are paid before
1 Vern 503 the time of examination the Devise was
2 Vern 246 taken daly attested. The same opinion
Paul. 120 was entertained by Ld. Hardwicke in the case
of Price vs Clay.

Devisees.

The case of Le Neve Cons a Will is in point to the same purpose. The Witness all had Legacies charged upon the Lands by two Wills. It was indifferent to them at the Testators death, and not before which was established severall times.

It is question whether the Devisee to the Witness was not void ab initio. so that he might testify as to the others without a release. It is Laudem nat. positively settled — — — — — —

The Stat. 28th Geo. 2d. being declaratory is an authority in behalf of the opinion that a Devisee to a Witness is absolutely void. and therefore that he is a competent Witness. — What this Statute is declaratory of — —

It is a general principle of the Common Law that a release by interested persons restores them to competency. But it is objected in this case that there is a presumption to found at the time of the attestation: but the same objection may be made in every case of a Deed

A Legatee or Devisee is a good witness against a Will for here his testimony is against his own interest. — —

So a Legatee who is a subscribing Witness is competent if it is indifferent with him whether the Will stands or not — — as if the

1 Burr 427 Pawl 130.

1 Burr 428. 1 Will 431 Carth 514. Stu 1253 2 Salk 381.

Pawl 129 Do 33 5 Bac 510 Do 516.

Ld Raym 738 Pawl 121 Day 134

Pawl 135 Salk 691

Pawl 138 1 Burr 473

Devisee

as if he has the same Estate by two Wills one of which he republished

Paine 6 118
Lev. 1233
Cant. 814
4 Vern 200
D. 23. 3 pl.

It seems that a testamentary distribution of personal and real Estate, may be good as to the former though void as to the latter for want of due attestation . . .

By Judge Reeve. as to the Question whether the Witnesses are not credible at the time of attestation whereon credibility can be judged by any matter ex post facto? This is a point much contested about the Judges Ld Camden and Mansfield delivered in opinion upon it . . .

As to the word "credible" Camden said still that it meant competent. But says that the intent of the Legislature was competency. The Judges agreed in the meaning of the term "credible". . . .

So Ld Mansfield says "two competent witnesses" would be just as good as "two credible witnesses". But who is competent? An Executor is not competent nor credible. An interested person is not competent, nor credible. So also of a person who has been convicted of the "crimen falsi".

The whole question seems to turn upon this simple point viz. Whether Race is or is not

Devised

is not interested or was he good at the time
of attestation? if not then he was not a good
Witness.

A question arises whether a Legatee
is a good Witness? If he never could be
admitted as a Witness it would be idle for
him to sign it. But it is answered that he
was interested. To which I (J.R.) answer that he
must have known that he was Devisee
for otherwise he could have no bias — That
is no danger of his seeing with a jaundiced
eye. — But a bias is not to exclude. it does
not in other cases and there is no proof that
the Legislature intended to make a new rule
of Evidence. But there is no interest vested
at the time of the making the Will — he had
nothing but an expectancy and this does not
exclude though it causes a bias. ——

So an heir at Law is a good Witness to
prove the Title of his Father. Now put the
a Witness not having subscribed may testify
though he is a Devisee of the same Land.
The reason is that the Will is a revocable
or revocable.

If the word it to have a new
meaning then indeed the Witness is to have
different qualifications from other Witnesses
— they mean nothing. To be done after the
attestation

Devises

attestation the interest is waived and the witness is not excepted. but he may release it. this in other cases makes a good witness and if so why not in this? (——)

(That is if he was not incapable at the time of the attestation. he could not be proved afterward. but then he was competent at the time to attest these facts. That much is certain that in consequence of a release as recited previously duly made the witness is competent and pray let me ask what is there in real property that alters the case?

Gaskell. The first case bearing on this point was Vin. Abr. Devise was made to B. B was a witness but as he was not allowed to swear. But there was a release. Now it is said if he was capable at the time of attestation the other could have a release to it. just as if one should afterwards become interested or a creditor. it may be that is but one case. Besides Attorney stands on different ground. for there the case was not on the ground of necessity. but to allow it in this case would be against the policy of the statute which intended to have the fullest & freest testimony &c in cases of necessity.

Devises.

In this case the Witness is only incapacitated. "Subnodo" while his interest lasts and not "in toto." The Judges speak of him as if they were incapacitated at the time.

15 Ray 305
Carth 314
Ed^o 314.

The next case was this. A devised to B and charged his real Estate with the payment of an annuity and two Legacies. He gave the annuity to C the wife of D. to her seperate use. And to C and D each of them a Legacy. D was a Witness to the Will.

In this case B tendered the Legacy to D who would not accept it. The annuity to C she could not tender. This was held to be Good.

The doctrine of purging his non-credibility did not come up. For the C. of said that the annuity would belong to him. This was incorrect in its way.

Another Judge said it would go to case him of the duty of maintenance. I answer it was not the true ground. But it should that he was considered as interested.

But it said that was not tender and this is in general equivalent to a payment. I answer there is a difference between tender and a payment. Besides the tender here was by the Devisee. whereas it should have been the Executor unless there was a deficiency of assets.

Devises.

of Assets. — For in England Lands are not to be touched like the Personal Estate is exhausted, even when Debts are charged on the real Estate.

The London view was from wrong quarter and is not good. I know in some Statute when debts are charged on Lands they must pay them.

2 Bro. 1253 / 1 Ves. 503. This case was decided in B.R. and on going to Exchequer Chamber was compromised.

The next case was this in application came before Lord Hardwicke and he ordered an account to be taken whether he was Creditor which shew what they thought him was insured- 1 Ves. 503 / 2 Ves. 374 able at the time of attestation. When it came before L.C. Hardwicke he said that he would not enquire into the fact of his being interested at the time of attestation.

This case like a Storm case but he does not enter into a detail. — These decisions were followed by a Statute enacting that Legacies to Witnesses were void; and that Creditors should be good witnesses. This was to prevent a Repeal from being endangered. Now it is said that these Statutes furnish legislative evidence. I answer the opinions of the Legislature ought to have but little weight. When one means to guard the business it proceeds circumstances

Devisee

But is true the Statute did not extend
See Mayfields Exrs 1 Burrow 414 ---

Wyndhams Executors & Burgess 414

Powell thinks that the case in Burrow was within the Statute. It was decided that after his interest was discharged he became competent
They did not go on the ground of an interest at the time of attestation and afterward purged
But on the ground of interest at the testators death. This is like the other cases ---

The next case was this. - A gave his Real Estate to have the profits applied for the maintenance of the poor in a certain parish. The three Witnesses belonged to the district which was thot to be relieved from taxes to support the poors and they sold their interest. The decision was in favour of their incredibility being purged.

Day Rep 45.

Camden thought it was an interest at the time of attestation and that it could not be purged. The rest of the Court differed from him
One argument of Camdens is fallacious. Viz a Lunatic attests the Will and afterwards became rational. he is a bad Witness and cant become good. But in the present case the testament is good at the time of attestation. Besides they are different and cannot be joined. for a man ceased is capable of attesting to confirm & republish. but a Lunatic cant.

Devises.

Another question is whether if he does not release his interest he could join some one and establish the Will except as to his own Devise He knows nothing of the other Devises and - - - - - - - - But it is said there would be a combination to establish each other's but is there no guard against such a combination?

18 Ves 370 It is said by Ld Eldon and that a man must swear to the whole or none but I believe that the above evil is not guarded against. - -

Wild in "questio vexata" Lincoln may see but not decisions In the time of Chief Justice Lee, Lane Lady Abdy against Sir in the Exchequer Chamber the Ct was equally divided so the authorities are equal in point of number. This question has been twice argued. the last time it was decided with Ld Mansfield the former was in the Judges Ct 3 against 2 the other way. Both these decisions have been reversed in the Ct of Errors. - - Lincoln by Judge Lee. Ld Ct's decision reversed.

Who may devise. The rule in England is that all who may make contracts with respect to Real Property and are not disqualified at Common Law or by the express words of the Statute of Wills may devise.

Finch 18

Devises

By the words "all persons" in the Statute 32 Henry 8th is meant natural persons as distinguished from civil or bodies corporate for under this Statute Corporations can't devise. (Gulds)

Between the time of Wm 1st and Henry 8th no man could devise but the Statute says "all persons may devise" this means all who could convey by Deed or devise personal property might devise real & Rents

Pawl 139
1 Roll 838.

As to natural persons there are four positive disqualifications in the Stat Henry 8 viz Coverture. Infancy. Idiocy and Non-sane-Memory and there are Common Law disabilities

Pawl 142
Dyer 354.
1 Vern 300

According to the construction of this Statute three of that persons who could not convey Lands before the Statute during this time can't under that Statute devise them.

Pawl 141

According to the construction of our Statute all persons who before the Statute could devise property which was devisable at Com Law can devise Lands &c (all persons not legally capable excepted)

1st In certain parts of England. Infant may devise by custom. — Full age is completed at the anniversary preceding the day of one birth

Pawl 140
4 Salk 44. 686
1 Ld. — 142
Ray 84
Roll 839

Devisees

Pawl. 144 Dyer. 143. 1 Bl. Com. 303

2nd An Idiot is one that has no understanding from the time of his birth. ---

But a person is not an Idiot if he has any glimmering of reason or if he can tell his age.

Pawl. 145 Co. Litt. 42. 1 Bl. Com. 304

A person deaf dumb and blind cant do wrong for he is deemed to be an Idiot as wanting those senses which furnish the Mind with their ideas &c

Pawl. 145 Co. Litt. 247. Dyer. 168

3rd A person of non sane Memory tho not an Idiot cant devise by his Will as are meant Lunatics or distempered generally.

It is not an Error that the Testator can remember common events he must have a disposing memory &c he must have a sufficient understanding to make a reasonable disposition of his goods &c. ---

4 Coke 61 Hob. 235. 1 Salk. 113 Dyer. 387 & 32 Hen. 8 Pawl. 147 36 Hen. 8 c. 14

4th A Feme Covert cant devise in England. for as all are bound to the Law of the Country & the Custom of England is that a Feme Covert cant devise without her Husband for the Law of Coverture

Hob. 195 D'n. 438 2 Salk. 55

That been decided in Connecticut that a Feme Covert can devise Real Estate with her Husband for the Law of Connecticut devises whatever is devisable except so far as the Husband by it would be affected by the Civil Law - a Feminine to her Husband & Children are protected

The above decision in the Text was made by the Ch. of Exch. at Law 1757 Cases - 325.

Devises.

She can't devise personalty unless her husband consents. — This rule it seems relates to personal property belonging to the husband by marriage or which he has a right to controul.

There seems to be nothing then in the condition of Coverture to prevent a Wife from devising what is devisable provided the husbands rights are not injured. ——— ——

She may in Cont[e] devise real property by Statute: but even then she can't devise from the husband & his Creditors what she is entitled to it in possession after the husbands death. *i.e. the consent of the husband to take effect

But if the husband is bound for life then these may devise for she is a feme sole and may act as such.

But there are many ways in England in which a feme covert may become possessed of a right of devising or obtaining property

This may be done by either of the two modes of Settlement. 1st By way of Trust. —
2nd By way of Power and Use. Such a Settlement may be made before or after marriage but however after it must be done by way of Grant or Release. ——

All Deeds however that are Equitable agreements is sufficient for these purposes though the

Settlements

3 Atk[s] 545. 709
Peake 502 +
1 Vern 303. 518
2 Vern 75
1 Br[s] C[s] 10
Pun[s] Cases 264

1 P. Wms 126
Do — 240
2 P. Wms 316
Eq[y] Ca[s] Ab[d] 891
Bracton 60
Bac[n] Ab[t] 73 111
Co[k] Litt 45a 10

1 Roll Rep 307
5 Bac[n] Ab[t] 498

Powell 105
Vent[s] 104
2 Bac[n] Ab[t] 49

Powell 180
2 Vern 595

Devised.

27. Rep. 695.
2 B. & C. 1156
2 Vern. 191
Powell 168

settlement is not actually made, and the Heir will be compelled in Equity to make a conveyance in performance of the Agreement for Equity considers that as done from the time it is agreed to be done.

2dly. By way of Trust as if a woman having real property, covenant before marriage with Trustees in Trust for herself for her separate use during coverture and afterwards in favour of such persons as she shall by any writing direct or

Powell 150
Vern. 672

A Devise by her will be a good direction of the Trust, and supported in Equity. This is not called a Devise, but a writing in the nature of a Devise.

3dly. By way of Power well & duly executed. As a woman can make a Devise of a copyhold estate by virtue of a Power

Powell 162
3 Atk. 707
27. Rep. 695
2 Vern. 672
3 B. & C. 1156
1 Vern. 108

given her for that purpose, and the Devise shall be by writing, attested & Devise by her will be a good declaration of the Trust, and supported in Equity, and the Devise making such an Appointment is good in Chancery.

So now it is settled in the Case of Thomas Lacy in Powell under the power of Nobbs. Mr. Powell dissented in the case of Sarah Hide in his Reports.

Devises.

Every power that executed takes effect as if the limitation in the instrument of conveyance or rather appointment had been contained in the original Conveyance or Deed creating the power. — The disposition is considered as taking place when the power is executed. Although the examination of the appointed does not take place till the execution of the power

The Deed of Settlement is considered as the Deed of limitation. — The appointment by Deed must in these cases be executed according to the Statute of Frauds

But if the Feme Covert is an Infant she can't execute a power over her own Estate for discretion is wanting. ——

Paul 163
Co Litt 171.

Paul 168
3 Atk 397
1 Ves 264
3 Bacon 138
Dr 152
3 Salk 87 10
714. 715

Restraint and Penalty of Instruments are not expressly provided for by the Stat 34 Henry 8th Though implied from the words "his own free will and pleasure". ——

The same rule double claims held for free will which is essential to the making of any Contracts insurances.

Paul 170
Dyer 143
Ray 334
1 Bl Com 136
5 Coke 119
Paul 6 163.

It is to be taken that if a sick man is induced by excessive importunity to make a Will in order that he may obtain quiet tho by restraints and is sick but that must be proof of undue importunity.

Paul 170
Style 427
1 Ch Ca 68
Hardr 424

Devised.

2 Eq. Ca. Ab. 357
Dalt. 172
Dyer 173
Hob. 107 157
Roy. 84
1 Sid. 152 - 182
Comb. 84
Carth. 34
3 Salk. 238

Part of the disabilities mispatched continuation of the Devisee's Act execution and publication. it would be void though the disabilities be removed before its consummation by the Testators death. for the consummation is founded on the intention which is void.

Pawl. on Flowden 176
Litt. — 284
6 Co. Litt. 185.
Plat. sec 506.

Joint Tenant in Fee simple can devise in England this was the rule as to Devises by Custom, before the Statute of Henry 8th. for the survivor claims the whole by a title paramount. he claims by the death of his Companion the Devisee after his death by survivorship.

Cowp. 200
Dall. 12. 178
Dy. — 218
1 Eq. Ca. Ab. 172

Joint Tenants are totally disqualified by stat 34 Henry 8th which declares expressly that all persons may devise and be devised as to Lands, Copyhold and Common.

3 Burr. 1488
Peakham 87
3 Coke. 31
Pawl. 170
1 Eq. Ca. Ab. 172

So a Joint Tenant makes a Devise of his part and survives his Companion and dies it is not good it is void. "ab initio" he had nothing at the time that he devised.

The Comm. on Joint Tenants can devise and the words of the Statute are general that is no Survivorship. It is a general rule that a man can devise Land that he was not seized of at the instant of the Will. This seems indeed to be the Common Law rule as applicable to Domestic Custom.

Devises.

Thus if the Testator devises "all his Lands" and afterward purchases more the latter does not pass — A Devise of Lands is in nature of a conveyance "in presenti" — to take effect "in futuro" — The donor must have a present interest in what he conveys. — There are some opinions to the contrary.

Paul - 183
Dº — 198.
2 Bac. 51 & 54
Co Litt. 111
Litt. Elix. 104
Salk. — 237
Hobart 30
Holt. 246.

Lively is defined with — "ex necessitate rei" — It is observed as to an after purchased Lease for years — that is only a Chattel — For a Will of personality is not considered as Common Law as fixt of a specific thing. But as an attainment of an heir to the personal Estate.

Paul. 191
Dº 183. 189
1 Ld Raym. 545
3 Dº — 109
Salk. 234
Paul. 187.

So in a Devise by Custom it is necessary that the Devisor die seized for the Estate is not consummated till the Testators death. — Thus if the owner of Land after devising it is disseized, and continues so until his death the Devise is void. — But if the owner at the disseizin it is by fraud — for in such a case the Devise will be good in Chh.

1 Salk. 378
Dº — 816
Paul. 184
566. 611.
Hobart 30
Holt. 748
1 Roll. Abr. 174

The same rule obtains under the Statute of Henry 8th

But if the owner be disseized at the time of making the Devise and afterward enters and continues until his death the Devise is good — for he is said to be seized "ab initio." — He is seized by relation and an action lies for the mesne profits.

2 Bacon 34
Mod. 217
Hobart 30
Holt. 343
Dº — 251
Paul. 129
Cowden 341
2 Bacon 57
Salk. 238.

Devises.

Powell 202
Sheriden 322
Hobart 11
Holt 242 251
L Raym 138
Salk 237
2 Burr 1186
7 Rep 40 b 41 b

It has been much doubted whether a Devise of Lands not in mind at the time the Devisor but subsequently descended and after made purchased by the Devisor is good. — Decided not to be good for contingent interest in the same principle a Devise by a Mortgagee of mortgaged Lands will not pass the Eq. Red. afterwards purchased by him. — — —

Powell 202
3 Ch. Rep. 27

In Court's action is not necessary by the Devisor. surrender is sufficient. The word Seized. not legacy is used in the Conv. Statute

So in descent by Statute right of possession is for most purposes equivalent to actual possession.

And in England a person having an equitable claim to Lands (as a claim in the Ct of Chy. may in Equity devise them.

Powell 2 637
2 Ves jr 144
5 Mod 78
2 Vern 49
2 Ch Cas 31
1 Vern 496

Thus an executory contract of A to sell Lands to B. before the conveyance B devises them and dies — good in Equity against all claiming against A &c

Powell 208

The Widow is a Trustee to the Vendee and on a bill by the latter the Ct would decree a specific performance.

Powell 212
2 Vern 322

Paid is not treated as a Devise of future Estate the Lands belong to the Vendee from the agreement in Equity,

But the Land will not pass by a Deed made before the executory agreement is entered into.

Devises.

There is no Parol Assent in Equity to a Devise if the Lease is made for the Payment of Debts.

It is said that a Will can be set aside by a Court of Equity on account of Fraud But Ch. of Law set them aside and the reason is that a Will obtained by Fraud is not a Will and is void at Law.

1 Br. P. Wms. 518.
2 Vern. 183
2 Atk. 224
2 Atk. 134
3 Atk. 544
3 Bro. C. C. 354.
Cont. Pas. Ch. 123

A made a Will by agreement with the Heir at Law. the Heir does not fulfil his agreement. Ch. will compel him to do it though they will not avail the Will. for the Will was not obtained by Fraud. but the Fraud consisted in the Heir not fulfilling his agreement.

1 P. Wms. 488.
Pas. Ch. 4

Of things devisable. In England under the Statute of Henry 8th. no other than a Fee Simple is devisable. Formerly "Estates of Inheritance" being declared by the Stat 34th of Henry 8th. to include Estates in Fee Simple only.

The words of any Statute being "land and other Estates" include all Estates "per autre vie" — And Chattel interests are devisable at Common Law as Terms for Years.

2 Vern. 4
2 Bro. C. C. 30. and 3rd 8
2 Ld. Ray. 1175

But Lands in the Isle of Jersey and other Lands not devisable by Customs are so under that Statute. All

Land

Devised

"ale Lands then devised subject qualified
not the Tenant Estate.

All Estates are not devisable but
all Lands are & the Tenant has a devi-
sable interest in them

Tenements and Hereditaments not
valuable are not devisable under the
Statutes as Annuities Franchises Ways &c

The words of the Statute of Wills & Test.
are "of annual value" - Things then are
not devisable but as Estates but
easements.

An Annuity is not devisable being
valuable. But Rent is devisable with the
Statute of Henry. provided the owner has a de-
visable interest in them

An Annuity is fee is devisable it
is defined from a real in the Statute &
by them elsewhere in the Reign of the Grantor.

What Estates are devisable under the
Statutes? or what Interests must the Devisor
have in the thing devised?

Then are several Estates in Lands called
Estates in Fee simple &c. 1st Absolute 2d De-
terminable. 3d Base Fee. 4th Conditional

Since the Statute of Wills Fee Conditional
is not considered to pass real Estate.

Paul 229

Co Litt 359
Cro Jac 224 Bro
Do — 241
3 Coke 32
10 Coke 84

Paul 220 b
Co Litt 359
1 Atk 8 510
Litt Sec 581
Co Litt 515
3 Coke 33

Paul 222
Co Litt 191

Hawkins 55
2 Bac Abr 170
Vern 180

Devises

- as an annuity descendible - all things devisable by the statute of Henry 8th -

Fee Simple is used in its most general sense - and is distinguishable from Estate Tail and "pour autre vie"

Fearne 232
2 Bulst 184

No Estates in Possession can be impeached otherwise or not - as to the former there has been no controversy of opinion always held descendable.

Fearne 232.

Estates not in Possession may be divided into — 1st Reversions. 2nd Vested Remainders. 3rd Contingent Remainders. 4th Estates subject to condition of Reentry.

These interests are all capable of descendible and devisable — Though it was formerly holden that the third class were not - the Estates in Possession -

3 Bulst 184
2 Vern 232
Hobbs 33
Cok Elix 281
293. 387. 405.

As to Devises of Reversions vide -

A reversion expectant upon an Estate Tail is devisable by Statute of Henry 8th -

Fearne 234
16 Co 71
2 Vern 221. 288.
6 Co 111.
Cro Eliz 60
4 Co 30
3 Leon 288.
11 Co 81

So a Remainder expectant on an Estate Tail is devisable. Indeed this is a vested remainder

Fearne 235
Cro E. 313
2 Vern 121. 382
Salk 232

In Contr. these can be neither Reversion nor Remainder expectant on an Estate Tail

Devises

Estates in Fee Simple may be Legal or Equitable both are devisable under the Statute of Henry 8th. neither an Equity of Redemption of an Estate is granted in Tail. So A for Bond his Heirs & assigns devises to the Use of Henry 8th

Powell 93
Do 104
2 Black 948
1 Ruiss 85

What Estates may be created by Devise

A Tenant in Fee Simple may devise and dispose of the Fee simple which can be created in the Subject by the act of the parties — So one having an Absolute Fee Simple in possession reversion or expectancy may by Devise create a Fee Tail.

Powell 257
Roles 86a
Powell 238
10 Coke 97
Co Litt 122

But a Devise of a Fee simple after or when a Fee is not good — This rule however relates to Devises considered as Dispositions "in praesenti" — and not to the operation of Devises by Virtue the rule is now evaded — But the Estate by way of Executory Devise — for the Contingency shall vest

Powell 239
11 Rep 77
Litt 97
Salk 231
Powell 250

So a Tenant in Fee may devise to an Alien for his Life or Fee as before and in that case the Devisee may act immediately on the Devisors death. The remainder in this case descends to the Heir of the Devisor

Nels 280
Comyns 241

So a Tenant in Fee after having devised for Life or in Tail may devise other Estates

Powell 204

to C

Devises

ant of the Estate remaining in him (except the reversion) till the whole Fee is exhausted the latter to take effect on the expiration or determination of the former

Plowden 35
1 Saund 285
2 Rule 39
1 Ventris 144

And a limitation of the ulterior Estate remaining in the Devisor may be either by way of remainder or by Devise of the reversion.

Powel 240

So a Grant for Years of Land may be created by Devise "de novo." - Same. Could a Term for years be created out of Land &c not at Common Law?

10 Coke 48
Powel 242
2 Bac 373
page 318

Estates created by Devise

may be either absolute or conditional.

Powel 245.
Dyer 126 348

Thus to A for Life generally or to A for Life paying a certain Rent to the Devisor and these conditions may be either precedent or subsequent.

Powel 246

Salk 167

There are technical words to distinguish these two species of Condition Every condition is to be construed precedent or subsequent according to the apparent intent of the Devisor

Powel 267
2 Vern 513

But a condition describing the qualification of the Devisee is construed precedent e.g. to A if he marries with the consent of the Executor &c

Powel 248
Winch 21

But a Devise to A and his Heirs upon condition that within three months after the Testator

Devises

Vaugh 165 — Statutes of Uses & Wills expounded & reconciled — all devises to Uses & subsequent — a precedent index & passed

Estates created by Devise may be either Legal or Equitable

Vaugh 271 2 Roll Abr 785 Cowp 8. 295 — A Devise of Lands is like the Devise of other Legal Estates or of a use since the Statute of Uses & 27 H. 8. is a Devise of a Legal Estate & continues the same nature the Legal Estate to the use

But a Devise of a use before the Statute of Uses was an equitable Estate only

Vaugh 271 Prec 283 — So at this day a Devise of a Trust in Equity. Equity stands to be bounden in Trust when the Legal Estate is vested in one in Trust for another

Uses were devised at Common Law before the Statute of Uses — Land could be devised by Will as uses being limited on it & could be assured to the use of any other than the Devisee for that would be contrary to the Statute of Wills in the face of it

Vaugh 270 4 Cake 4.

But a use is also intailed it was assured to the Estate tail que use — Land is devised to one without words to the use of A. & his heirs only the use of his fee is in the Devisee for life

Vaugh 271 2 Atkyns 4. Cowp 292

So an equitable Estate may be devised though the estate at Law

Vaugh 285 — Trust

Devises.

Trusts. — Indeed all such uses as are not executed by the Statute are called Trusts. — 2 Eq. Ab. 383 — 5 Modern 63.

As to the origin of Trusts see — Powell 283-8-9 — 5 Modern 63.

The difference between a Use and a Trust is that the former carries the legal estate, and the latter does not. — Powell 162.

As to the difference between a Trust executed and executory see — Powell 283 — 1 Mth. 58.

1st. Where the Trustees are directed in the instrument creating the Trust to execute a conveyance of the Legal Estate it is executory.

2nd. Where no further conveyance is directed it is executed. But the executed Trust must include the legal Estate, for it is still an Equitable interest. — Powell 286 — 1 Mth. 581

A Devise for the conveyance of the legal Estate is as much a Trust in this case as in the other. Lord Hardwicke says that all Trusts are in their nature executory. — Powell 287 — 1 Mth. 581. — 2 Atky. 323.

One may devise not only a devisable interest but an authority and such interest as a Devisee shall have the ordering disposing and settling of the Tenants Lands. Such a Power however gives the Devisee the Power only of managing the Estate as his Heirs, and he has not it at Will. — not to lease a lease for years for he has no interest. — Yelverton 75 — Powell 289 — Dyer 316 — Cro. Eliz. 578 — 734-744.

Devised.

Powell 320
Moore 444
Co Litt 113
1 Roll. 330

But if one devises that his Exr shall sell his Land or that his Land shall be sold by them and dies Exrs constituted and empowered them to sell they have a right to sell — A devise of his personal Estate wch is insufficient to pay his Debts is a sale for the payment of his debts and all the residue of his personal Estate goes to the Exrs. in this case if the personal Estate is sufficient to pay the debts immediately —

Powell 293
Cowp 333

Authorities which may be devised now. Powers are of two kinds — 1st Naked. — 2nd Coupled with an Interest. ——

Cowp 346
Powell 292
3 Co 84 533
1 Roll 113
Do 333

A naked power is a bare authority to do a thing and no interest is devised (as above) In such cases the Trustee descends to the Heir. till the sale

And a release of the authority by the person employed is void — Thus where the Exr is empowered to sell and releases to the Heir the release passes no interest for the Exr has none.

Powell 294
2 Eq Ca 376
1 Burr 120
Cowp 204
Wilson 176

Such authorities must be strictly pursued. and the execution of the power must therefore be confined within the limits of the power itself.

So also the power is strictly personal and not transmissable and if delegated to two and one dies the other cannot execute it. so the Heir of an Executor cannot act as Exr but as Trustee —

Powell 304
Dyer 177

Devised

Because the power in the last case does not amount to the Exᵗ of the Exᵗ — So if the Case is that his Land shall be sold by his Executors and the surviving Exᵗˢ die Leaving a Plaintiff an Exᵗ he cannot sell. — Powell 295. Moore.

But if a Sale satisfies the Words of the Devise the Sale will be good in that respect. — Thus if one devises that Executors and assigns his Land to be sold by his Executors, and one dies a Sale by the other two is good. — Powell 296-7 Cro Eliz 25 Dᵒ — 524 Dyer. 174 1 Leon 13 Moore 341.

If a man devises his Land to be sold without naming a Person to do it. the Exᵗˢ are the Persons to do it. if they are to dispute and minister the assets as in payment of Debts. — But if the Exᵗˢ have no concern with the assets (i e) they are not assets in their hands the Heir must sell. — Powell 3ᵈ 1. 395. 2 Levinz 280 1 Atk 420. 1 Bac 200. 1 Levinz 311. 1 Atk 420. 0 Chan Ca 297 299 307 1 Vernon 304

In the last case but one the surviving Exᵗ must sell alone for they take as Exᵗˢ — without the same Power would accrue that the Exᵗˢ or the Exᵗ may sell. — Powell 298 307 Dyer. 370.

If the Person thus entrusted refuses to the Person for whose benefit the Sale was intended. may in Chᵗ compel him. and if the Person appointed should die. Chᵗ in some cases would attempt a Trustee. — Powell 300-3.

A Devise of Land to an Exᵗ or J. S to sell. is a Devise of an authority coupled with an — Powell 301 Dᵒ — 302.

Devises.

2 Levinz 221
3 Levinz 78.
Dyer. 210

an interest. So if one devises the profits of his Lands to A till his Son is 21. to sell the Land; the authority of A is coupled with an interest.

In these cases the Devisee and not the heir shall have the Estate within the expiration of the time limited. and if the Devisee in such case should die his Executors shall have it during the time limited and the reason is that it is his Estate during the time.

Powel 302.
1 Bac 260

So the Estate of the Devisee will continue untill the expiration of the time

Powel 302
Cro Eliz 98.
Dyer. 210.

that the object of the Devise should be removed. - viz. if the Son should die before 21 -

The title is attested as it is to all Natural authorities.

1 Rep 132.
2 Roll 831
1 Will 149.

Under a limitation to such child or children of A or B shall ascertain - an appointment to one of A's children is a good execution of the power

A power to appoint by Devise is not executed by a new recital of such Devise

8 Rep 115.
2 Co. Blk 136.
1 Atk 558.
2 Bro Ch 297.

Where A having a legal Estate in Trust to devise to either of his Sons, devises all his Estate to his Son B after the payment of Debts &c in this case a Trust Estate does not pass

2 Vern 121
Cases in 340
Cro Jac 500.

An appointment by Will is no execution of a power to appoint by Deed.

Devises.

Judge Reeve says a Devise in the words "I devise my Lands not to be sold" is a Devise with an Estate — but "I devise my Lands to be sold by A" is a naked authority. 6 H 6 fo 382. 6 H 6 fo 25-6

The person vested to pass the property in any debt, is called a Trustee — and if he will not accept the Cestuy will obtain a Decree against the person. 1 Powis 304

Who may take by Devise?

In General all persons not incapacitated by Law may take by Devise under the Statute 32 Hen 8th, as explained by 34 & 35 Hen 8th —

Devises in "mortmain" and to "bodies politick" are not allowed.

The Stat 43 Elizabeth authorised Devises to Corporations for Charitable uses but this exception is much narrowed by Stat 9 George 2d. Powell 314. 1 Bl Com 479. Hobt 136.

Devises may thus be either to natural or civil persons except so far as the latter are incapacitated by the Statute above. Powell 315.

Natural persons who may take must be either "in esse" or not "in esse" —

Those "in esse" may take unless prevented by civil disqualifications — Coverture is one disqualification — The Husband may indeed at Common Law defeat the Devise by disposing of it — but Chy will interfere to prevent this

(180)

Devises

Vest injuring the right of the Wife. ——

Fawc. 311 — So the Wife may be the Devisee of the Hus-
1 Eq. Abr. 173. band though she cant be his Grantee. for the De-
Hob. 241. vise does not take effect till after the death of the husband

Fawc. 318 — An Alien may take by Devise
2 Vin. 300. but he can hold it no longer than office found. it
4 Leon. 84. shall vest in the King. ——
4 Co. 66. 141
3 Bac. Abr. 258.

Dyer 303. — An Illegitimate Child cant be a Devisee
Moore 19 unless he has acquired a name by reputation
6 Co. 65. Thus a Devise to the Son of A. is not good unless
2 Rolle 43. the Devisee has acquired the reputation of being
the Son — he being a Bastard — But a Devise to
A.B. the Name acquired that name is good tho'
he be a Bastard.

Fawc. 344. — If a Devise is made to the Chil-
Moore 13 dren of A. the Illegitimate shall exclude the Ille-
Dyer. 345 gitimate — and if such a Devise is made by the
Mother of the Bastard it seems that the same
rule holds.

— As to natural Issue not in esse" as
Children" in Voluntate manu" at the time of the
Testators death — Some distinctions were
formerly taken between a Posthumous Devisee and an
Infant in Ventre sa mere" and a Devise by way
Fawc. 320. of Remainder. the latter was holden good if
Moore 357. the Infant was born when the Particular Es-
Salk. 228. tate determined. Howard v. Carter

Recitals

But now by stat. 11th William 3d that Estate
is limited to the children to take as tenants in
common & the survivorship is taken away
& their shares vested in their Father's life-
time. Shall take Quere this Protection Deed

2 Ves. sen 102.
3 Bac. 1714
4 D.o — 2.12.
Salk. 828.

So a distinction has been taken between a
Devise to A. for years if he shall so long live
& "for term of years if he shall so long live" in the latter
case it will well attend the term tho' he die
before the rent becomes due when the Term
shall be gone & not for the Rent

Fonb. 332
1 Levinz 138
Salk. 229.
Str. 1063
3 Bacon 124
Fonb. 426.
3 Ch. Ca. 50.

But to an estate for life the Term is
the Estate is good by way of Executory Devise and
the Freehold descends to the Heir at Law same time

1 Roll. 607
3 Bacon 124
Fonb. 362.

The last distinction does not contradict the
rule laid down. But Devises to Infants "in custody
for maintenance"

1 Bac. Ab. 243
2 Vern. 81
Bac. Ca. 80
Ca. Ch. 30

So under a Devise to such children
as shall be living at his death, a posthumous
child will take

1 Ch. Ca. 240.
2 Vern. 323
2 Ca. Ch. 237.

But where a Devise upon
such a child "for maintenance" a good Legacy
how after Devisor's death it not settled in England
according to Equity but the profits of the premises
in favour of the Devisee

1 Wilson 165
Vern. 428
Salk. 230
Ld. Raym. 83
Fonb. 332.333
Coll. Ca. 803
Mod. 43.
2 Salk. 673.

The objection to the infants taking in such
a case is that he has no capacity to take a Devise
the Devisee takes effect and the Freehold must
be in abeyance "in nubibus" till he is born
he takes at all

1 Ld. Raym. 463
2 Wilson 325
Fonb. 324.330
3 Bac. 124
4 Burn 215.

But if he does not live to take
it amounts to an estate held in the case of an

2 Ld. Raym. 709.
1 Roll. 609.

ex.

Devises.

5 a 83 Rep. 57
3 Wilson 323
Co Litt. 11.

Executory Devises do not take an Estate tail which is always good - The Executory Devisees in both cases take the Estate in both cases when the Infant is born and the Heir is not accountable for the intermediate Profits.

Fan 232 332
1 Levinz 135
1 Ch Ca 173.
Salk 227.

At any rate if there are express words or facts adduced in the Devise warranting an inference that the Testator was aware of the Devisee incapacity to take immediately he shall take as by a future Devise. Thus To the unborn Son of A when he shall be born.

Fan 325 335
4 Burr 2171
2 Vern 428.
1 W Blan 165.
Salk 230
2 Mod 8 a
10 W m 485

And according to more modern authorities such Devise to such a Child not in esse does not take effect at all but it is an executory future Devise

Car Ca 40
Mod 48. 57.
Cro J 437.

So a Devise to an Infant in ventre sa mere will remain void unless the Infant survive

Civil persons are the Devisees Executors and Administrators - Thus a Devise to the Ex or of A is good - So also to Civil persons as in case of the Infant is clear - as to the Ex or of A Ex or

Fearn 333

But Religious ones are not such Civil Persons as will take in that capacity or character quere?

6 Rep 67
Fawc 340
Do 407
Do 458

Every Devisee must be sufficiently designated or he cannot take - The designation may be either by naming or describing him - and though his name may be mistaken yet if he is sufficiently described by the will he can take - If the name does not apply to the Person &c

Devises.

This requires to be taken with some qualification. Parol evidence may under certain restrictions be introduced to explain the ambiguity. — Hobt. 3 / Co Litt. 3a

And the description though not strictly applicable may be rendered good by reputation. Thus to A the Son of B having a Bastard but the reputed Son of B. — Powel 338. / Salk. 410

But that rule does not hold in the case of a Bastard born after the Devise is made, for he must be capable if at all at the time of his birth. — But he can not claim the reputation of being the child of any one, but by continuance of time — besides the birth of such a child is "potentiæ remotissimæ" — 1 Salk. 122. / Powel 338. / 9 Co. Rep. 129. / Co Litt. 123-4 / 6 Coke 55. 66.

Hence also a Devise to the natural Child of A will not answer to the benefit of "in rerum natura". — Powel 339. / Co Litt. 330.

A Woman may take a Devise under the description of "the Wife of A." if she is reputed to be his Wife though she is not legally so. — Powel 241 / 8 Coke 73

And a Devise may also be established by names or designations that have an equivocal ambiguity in them. as "puer" for male or female. and so if a Devise be made "Devisee puero" of the Devisee a daughter may take. — Powel 340. / Dyer. 337. / Moore 164 / Hobt. 32.

The word Child or Children is a sufficient description. — Thus to A for Life and after

and

Powell.

of Land to his Children his Children take a remainder fee Tail descendible to their Issue

Powell 334 Moore 320 — Issue of Children is used as descriptio Personæ in which case the persons described take as Purchasers — So if an Estate is devised to A and his Children Matthew Lucas's children he and they take as joint Purchasers of Land Estate

Powell 324 6 Coke - 17 6 Co Eliz 743 — But if A at the time of the Devise had no Children "Children" in a will shall stand taken i.e. as the children take as Issue. They cant take in a Mass per se quia Purchasers because there are no words of remainder and they can't take a present Estate as Purchasers because they are not in esse Some Author an Estate tail &c.

6 Coke 11.16. Powell 332 Dan's 369 1 Ch Ca 450 1 Bulst. 215 1 Vent 227 2 Ro Ab 794 — A daughter cannot take under the description of "Progenies Consanguineitatis et Sanguinis" of the Devisor if there is no Son — In this case an elder daughter excludes younger

Powell 342 Cokes 10 Salk 11.303 1 Ld Ray 312 — The description of an Heir may be in the general or Special. The former meant the description of any person who may be found to answer the description.

Powell 340 — 1st. General — as if one devises to A and his remainder to the next Heir male of the Devisor he who shall then be the next Heir is considered to be the Devisee

Powell 340 Hard 33 — So a Devise may be construed by a Devise to such a Man's family and

and

Devises.

and it will enure to the heir & next of kin of the Mack. Family &c. Dyer 333.

Under a Devise to the Testator's Heir at Law & A. his Legal Heirs & Assigns shall take if not his Collateral Heirs of the whole blood Powell 347. 2 Vern 360. Pre Ch. 392.

If the Devise is made to the next of the name of the Testator the next relation of his of that name whether male or female shall take.

So a Devise may be described by the words "next of kin" to the Testator in which the Person answering that description by the rules of computing Kindred shall take. Powell 347. 1 Salk Eliz 570. 3 Salk 270.

And if a particular Date is interposed the words "next of kin" are construed to mean those and those only who are such at the death of the Testator 3 Cas 278 Do 294

So the words "nearest relation" of any name is a good description but in that case "relation" is to mean collateral and include all relation of that degree mentioned by the Testator. So the words "next of kin" are meant by "nearest relation." Persons not falling under that description may take that "by my nearest relation. I and R." have the latter not so near as the former may take. Powell 350 Do 405. 3 Br C.C. 32.

Gave devised to his nearest relations by the Statute of distribution Gave his Wife takes no part for though she would be entitled to a Powell 350 Vern 84

part.

Devises

3 Atk. 750 / Dº 1 Ves. 407 — a Grant under the Statute of Distributions the next of Relation by Consanguinity.

Powel 350 / Dº 497 / 2 Eq. Ab. 352 / Dº 380 / Dº 388 / Salk. 241 / Vern. 84 — If a man Will Devise Specifically that his Estate to any more Relations who would take under the Statute of Distributions are Legatees.

Salk. 241 — A Devise could not have effect if the word Heirs or any Relation.

Powel 358 / 3 Eq. Ab. 248 — If Lands are Devised to be sold and the Devisee dies before Sale, quere whether the above Rule holds or the Devise be void on account of Survivorship.

Powel 358 / Cas. Ch. 257 / Dº 532 — If one devises Land to be sold & the money arising by the Sale to be paid to his Daughter who by marriage has changed a different name can she take according to the Devise, & the Intention she can take, if she is unmarried both at the time of the Devise and the time of the Testators death though she marries between the making the Will and the Testators death. But if she is unmarried at the time of the Devise & at the time of the Testators death but married at the time of the Testator's death.

Powel 358 / Vern. 383 — But Lord Hardwicke doubted to be determined, if the Devise is immediately by way of vested remainder, it is sufficient if she is unmarried at the time of the Devise. But if limited upon a Contingency, her name at the time of the Contingency happening decides her right.

Bacon 25 / 7 Bac. 2577 — It is a general Rule of Construction founded on Justice & Reason that a Forfeiture

Devises

of Freehold it vested to me. with the intermediate remainder to his Heirs. The Heirs of his Body. or his issue. he takes an Inheritance in the first case. Executed. and in the second a Fee Tail.

Dav.s 320
Pawl.t 355
2 Co.n 242
1 Co.k 330
6 Co.ke - 30
7 Co.ke 513

When the remainder is after an intermediate limitation the Devisee takes an Estate for Life. and the Inheritance in remainder.

Dav.s 323
D.o 230
2 Bl.k.s 230.
2 Bl.k.e 250.

The words Heirs &c are in such case construed as words of limitation and not of description &c to ascertain the quantity of Estate given to the first Devisee. and not to be designated who it is to take after him.

When the precious Freehold is limited to the Ancestor the word "Heir" is not a descriptive word or any — but as the reason of the rule that created Estates with the Feudal Tenure. Ch endeavours as far as possible to warrant the rule itself — It remains always

Pawl.t 357

to defeat the Inheritance.

A Heir may thereof at this day. take a remainder as a Purchaser under the description of "Heir" and though a previous Freehold is limited by the same Devise to his Ancestor. it will appear from the Devise that the word Heir is intended as a "descriptio personæ" —

Gulst 224
Sackv.e 333
4 Bl.ton 257
257 & 258
1 Ch.n Ca.s 184
Ch.n Ca.s 40
Moore 372
Pollex 358
6 Co.ke 17

Thus to A for life with remainder to his Heirs for life only — so to A for life and his Heirs male. A takes for life — though otherwise the

Dav.s 384
6 Co.ke 16
Ch.n Ca.s
6 Co.ke 40

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had been limited to his "Heirs Heirs" ——

Salk. 224 Parsl. 384 Ld Ray. 263 "To the "Issue" of his Body and his "Issue male" to his Heirs forever" Here A takes for Life only and his "Issue male" a remainder in Fee. ——

4 Rep. 2 a Parsl. 390 3 Atk. 731 1 Coke 103 6 Rep. 40 "Issue" in its most proper sense is "descendants" but it has been generally construed a word of limitation except where the intention to use it in its most proper sense is manifest.

Parsl. 262 1 Coke 86 Keane 25 If an Estate is devised to A for Life and after to the next Heir male of his Body and to the Heirs male of his Body" the word Heirs is a word of description. A takes for Life only and his next Heir male a remainder in Tail Male. Omitted the word "next" and the superadded words are useless and negatory ——

2dly Special. A description of the Devisee may be special (i.e. a particular description of the particular person - not a designated) as in the above case of a person who may be given to answer the description. ——

Dyer 38a "Item to A the Son of B" here the description not only designates a Son of B but a particular Son of B.

3 Rubr. 32. Cawl. 363. 1 Vin. 334 2 Do. 311 3 Vin. 500 Salk. 309 Ld Raym. 314 Parsl. 367 "To the Heir male of the Body of A now living" is a particular description of the person & Heirs

"To the second Son of A" this is a special description of the second Son of A in the order of birth.

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It is a Gen[l] Rule that the Devisee answer in all respects the description given of Him. Hence if a Devisee is described as Heir Male of a person he must shew that he is Heir in that sense in which the word is used by the Testator. Thus if one devises "to the Heir of B[n] generally and dies leaving B. B's eldest Son that takes. (Powell 369, Dyer 29, Coke 65.)

So if the Testator describes any particular Heir as the Heir female of B.[n] the person to take must answer the description i.e. or else must be Heir and Heir female. (Powell 370, Do. 35, Hobt. 34, 2 Roll. 416, Moore 862, 1 Ventr. 98)

So if the intention is clear one may take under the description of his Father or Ancestor as if the Testator takes notice that his Father is living — thus to the Heir male of the body of A begotten — leaving A a Legacy also. (Powell 370, Parkins[s] 20, 2 Burr 1070)

But if the Devise shews by positive words or by necessary implication a person not Heir general, was intended to take, by the description of a particular Heir — such person will take — thus to any Heir who is brother to A.B. Heir A.B.'s brother will take though he is not Heir general. (1 Vent[s] 379, Powell 373, Hobart 34, Lilly[s] 185, Sir C[t] 447, Do. 464.)

The word Heir is construed Heir apparent — Indeed the Gen[l] Rule of Construction as to all questions arising upon Devises is that the intention of the Testator shall govern if not contrary to Law. (Dane[s] 349, Dyer 34.)

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But here has been much doubt whether if an Estate is given to one remainder to the heirs male or female of his body (the words being words of description) it would be necessary that the persons to take should be heirs as well as male or female; or whether under such a description a special heir male or female might not take notwithstanding there was an heir general in esse of a different description. And the question is the same if the Estate is limited to the heirs female of the body of a Stranger — thus to the heirs female of the body of J.S. whether one who can alone take by having a son? A second will not.

Co Litt 7 b 24
Do 24
Powl 388/395
Rep Co 4 42
5 Rep 2 51 b.

A distinction exists between this and the above case. Heirs female without more do not bring females but heirs female denotes his female issue within their growth or not.

Powl 388
Co Litt 10. 22
Coke 35

If there is no doubt a man may devise to one heir male under words sufficient to constitute an heir. If I devise that an heir shall be sole heir of all my Estate. So if a man strangers have the word heir does not designate the Devisee, but the intent that is to take view a Heir.

Moore 564
Powl 395-8
Hob 75
Stiles 308

But if one devises making it Estate of his Heir? A takes by the Statute of Frauds.

Powl 378-9
Hobbs 49
Rep Ch 291
Stiles 301

The Case Rule is that if the devise is made for certain that the heirs intended must be such as

from

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from all other persons: the Devise shall not fail for trifling omissions. — Thus to Margaret the daughter of J.S. her name being Margary

So if the Wife of J.S. and he dies, and the Devisor dies still she shall take.

Hob. 32
Dawes 356-9
Do — 422
Noy 335
1 Co. 87.
Plowd. 344-5.
Do 3 or 523.
Dawes 405
Foann 295.

So where a sick man devised to his Posthumous Child and it was born before his death but it was adjudged to take under that description or designation.

Dawes 405
Sir C. Pl. 178

But if the description is false and not merely defective the Devise is not good — Thus to the Son of A. A being an Alien

Dawes 401.

Secondly if the person claiming under the Devise is reputed to be the Heir of A.

How a Devise may fail of taking effect.

A Devise may fail to take effect from some defect Apparent on the face of it or from something dehors the Will

Dawes 409.

Of the first kind is an uncertainty or Ambiguity in the words used as to the thing devised or the interest in it or as to the general intent of the Devisor. Such uncertainty is called patent ambiguity. — To limitations contrary to the Policy of the Law fall under the head of Apparent defects.

Extrinsic objections to the validity of

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of Devises are founded on some uncertainty or ambiguity arising out of circumstances not appearing on the face of the Instrument. —

So when a doubt arises as to which of two roads passing by the description and the words are intended to be given — Uncertainty or ambiguity of this kind is called a latent ambiguity. Patch 204 46

Of a latent ambiguity there is an immediate rule of construction that if in a Devise there is any uncertainty which can be reconciled the Devise is void. So far as the uncertainty extends and the Rule at Law shall be pursued and no parol evidence shall be permitted. —

Such uncertainty in the face of the Devise may be either as to the subject matter or the thing devised — the quantity of interest meant to be devised — or the person described as the Devisee.

1st As to the subject Matter thus "I devise that piece of my Land to A." —

1 Bac Abr 532. 2 Coke 32 Co Litt 5a Co Litt 15 1 Wms 300

A Devise of an House with the appurtenances carries no other Land than is necessary for the enjoyment of the House unless it appear that the Land was intended to be used in a more extensive sense —

2nd As to the quantity of Interest. Thus devise my freehold Estate to my Wife for

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four years" and if any of my five sons die before the expiration of that time the freehold thereof to be equally divided between those of his sons that should be then living. What is to be devised?

3dly As to the "Person" described. If the person described as Devisee is absolutely uncertain the Devise is void. That to the Eldest man in the County of Litchfield" or "the freeholder in Roxbury" do to my Wife for life remainder to the Eldest male issue of any Son.

No parol evidence is admitted in either case a Devise is never construed to be explained if possible

4thly Of Latent Ambiguities. If the power of the Devisee is extended absolutely in certain from explanatory Words the Devise is void

So also if from explanatory Words it is absolutely uncertain what Land is meant any instance of B. the Devisee having two of that name. But if the Devise was of any of my manors &c. B. the Devisee might elect &c.

If Devise may fail of effect from various other causes. That because the Testators intention is contrary to Law as to Assize and if he died without Heirs to B. So if in the drawing up of the Instrument the intention of the Testator is not followed the Devise is void in Law.

1 Bac. Abr. ...
Powell 412-17
1 Hale 672
Do. 734-5.
3 Bac. Abr. 176
1 Eq. Ca. Abr. 294.

10 Mod. 103.
Powell 220
Hil. 2 Jac. 2 Ro. 0 Bac. Abr. 82
1 Roll. 609.
6 Co. Eliz. 26b.
Vaugh. 335.
10 Co. 57b.
2 Vent. 347
Yelv. 132
6 Co. Eliz. 16b.
Powell 420

Powell 224
5 Co. 10b.

Powell 425
Do. 428

1 Bulst. 63
Powell 220
Salk. 234
Powell 432.

Powell 420
Moore 350

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But if the fact which is agreeable to the Testators intention, can be dissevered from the fact which is doubtful & the former is good and the latter is void as if the Testator devised a Freehold to Sempl and the Sentence annexed Condition that the condition is void and the devise good

Powel 427

Bac. 427 345
2 Ventr 31 57
Salk. 245
Do 233. 620.
Hobart 123
Dyer 12. 134.
Do 354
2 Rymer 886.
Ld Raym 392.
2 Do 1557
Black. 182
2 Ray. 587

A Devise may fail if in taking effect it would produce circumstances which would not take place without it. Thus if one devises Land in fee to his next Heir or to his eldest Son

As to what acts will breath the line of descent vide Co Litt. 12. 1 Shower 23. Salk 337 and Carthew 141.

And it is a Settled Rule that if one devises to his Heir the same estate in the subject matter which he would have taken by descent the Devise is void he shall take by descent and not by purchase

Powel 427
2 Ray. 1038

The reason of this rule is 1st That the Land may not be divested out of the possession of the heirs.
2dly That the Condition of the Devisee may not be defeated or rendered nugatory which would have been before the Statutes of Frauds & Devises 34 & 35 Wm and Mary. These rules have both ceased but the rule is of consequence in England as affecting the cases of Recovs and Fines

Powel 388
Do 436
Willms 304
1 Vern 238.
2 Vern 378
Powel 467-3
Do 435.

If a Devise to his Heir be void

immediate

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remainder. what would descend to the Heir as a reversion. Still the case is within the rule for the estate is not altered - thus "to my Wife for Life remainder to my Son A" - A being the Devisors next Heir.

So a Devise for Life only to the Devisors Heir. if no further disposition of the subject matter is made. is void. for he takes all the interest which he would have taken had there been no Devise. and the Fee simple which descends merges the Estate for Life. in

Changing Debts or Portions on an Estate devised to the Heir does not enable him to take by Purchase - the quantity of interest is not altered. the Estate is only incumbered. in

But it has been holden that if the charge on the Land was by way of condition. the Heir to whom it descends takes by Purchase. in

The weight of authority is against this distinction. for which vide

When a Devise is made which falls within the Gen[l] Rule to the Heir. but at the Devisors death is a Daughter. the birth of a posthumous Child will take away the title

If after an alteration by Devise of the time of the time of the Heir receiving the Estate. does not enable him to take by Purchase

Estate

Powell 430
1 Roll[e] 626
Bac[n] 491
1 Levinz 101
2 Levinz 118
Salk[d] 234
Carter 82
1 Ventris 83
Ld Raym[d] 607.
3 Levinz 127.
1

Powell 431.
3 Levinz 26

Ld Raym[d] 728.
Powell 433
Cok Ch[s] 833.
Do 619
Moore 644.
Carter 72
Salk[d] 241
Bac[n] 1270.

Powell 436.
Cok Ch[s] 161
2 Modern 286
1 Freem[n] 243-6.

Salkd

Salk[d] 248.
Cok Chas 839
Do 719
Powell 433
Carter 72
Powell 437.

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purchase the quantity of interest being the same but if the limitation to the heir by Devise be no Devise an alteration in the mode of descent. he takes by purchase (i e) as Devisee.

Fonb. 439. Hell. 145. Salk. 234 241. Carth. 72.

But if one leaving two daughters who are his heiress devises to them and their heirs they take by Devise as Devisees for the Devise makes them Joint Tenants but by descent they are Coparceners

So in the last case if the Devisee had devised all his Estate to one of his Daughters she would take the whole by purchase for if she only took half by the Devise her sister would be a Coparcener with her of the other half and so the Devise would be defeated.

Fonb. 441

And a Devise may in part be good & void in part. as to one entire thing. Thus a Tenant in Fee devises one half of Blackacre to his heir in Fee and the other half to the same heir in Tail. here the former is void and the latter is good ---

Fonb. 442. Ld Raym 280

Raym 408. Bro Ch. 420. 4 Mod 501. Plowden 443. 2 Burr 922. Stra 1 35. Show 325. 1 Mod 20. 2 Mod 313. Powell 572. 12 Mod 37. Com Dig 423.

A Devise may fail of it's effect by the death of the Devisee living the Testator ---- thus to A and his heirs. A dies living the Testator the heirs of A can take - and that is the case even though the Devise is revocable after his death.

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Waiver. A Devisee must elect & signify his assent to waiving the benefit of the Devise — and the Waiver may be either express or implied.

It is express when the Devisee actually declares to avoid the Devise — Powell 443

An implied waiver arises from some act of the Devisee from which it is inferred that he does not intend to avoid it.

It is a Case Law in England that a Person having a Claim upon the Thing Devised independently of the Devise and a Claim to the other part under the Devise, accepting the former Claim waives the latter, for the waiver is implied. Thus Blackacre is devised to a Stranger and Whiteacre to B. — if B. elects Blackacre under a former settlement he cant have Whiteacre under the Devise —

Powell 445
Do 454
Bun — 581
Do — 2323
Talbot 170

This doctrine of implied waiver is founded on the idea of a tacit condition annexed to the Devise that the Devisee will not disturb the disposition which the Devise has made

Powell 445-6
Do — 453
Talbot 170
2 Vesey — 14.
2 Vesey 317

But it is not necessary to give effect to the Devise that the thing devised be of the same nature or of equal value with that to which the Devisee has a Claim independently of the Devise — In such Case Chy will require the Devisee to make his election.

Powell 450
1 Vesey 336
Do L 426
Powell 304
Talbot 176

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If the Devisee be a Creditor and not a volunteer that Circumstance will not affect him.

Parker 452 2 Wms 412 2 Vern 614 2 Wms. 633.

How if one devises part of his Estate for the payment of debts and to J S another part to which a Creditor has a higher title than the Devisee, the Creditor must first take the latter and then claim his share of the residue devised to pay debts for the Land devised to J S is the Creditors.

If Land to which A has a higher claim than the Testator is devised to C by any instrument not executed in such manner as to pass Land &c. and a Legacy to A A may claim both Land and Legacy; Thus the double condition does not apply for the Testator has not disposed of the Land, it being undevised as to that.

Parker 458 2 Vern 298. 2 Wms. 307

But still if there is a clause in the Will. forfeiting what ever disputes the Will he shall forfeit his Legacy. his claiming the Land will defeat the Legacy for there is an express condition annexed to it.

Parker 460 1 Vern 19.

If the Testator gives a thing in satisfaction or in lieu of a particular thing it Jointed. that shall not exclude the Heir from another benefit. Thus the Testators Wife is entitled under the same agreement to a portion in Land and one in Money. and is

Parker 463 3 Vern 30.

first

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gives him a Legacy in lieu of the Money found. and devises the Land to him he may claim both Land and Legacy.

And in all cases to oblige the Devisee to elect as above it must be clearly evinced — that the Devisee taking both the interests would defeat the Devisors intention. ——

Thus the Testator having devised Blackacre to his Wife immediately devises to her Whiteacre by way of remainder — this does not preclude the Wife claiming Free Dower in Whiteacre — So a Wife may claim her marriage Settlement though not devised to her and a Legacy also. ——

A Devisee may fail of taking effect by the Devisor accomplishing in his Life time that it was the object of the Devise to accomplish

A Widow a Tenant devised 400£ to build a House and allowed her for this & other laid out more than that sum on the same House. it was held that she should not have the benefit of the Devise

So a Devisee may fail of taking effect in consequence of Stat 3 and 4 of Wm and Mary against Fraudulent Devises for under this Stat all Devises of Lands are void against the Devisors Creditors who are entitled to be

paid.

Powell on Devises 466
3 Atk 430.
2 Bl Com 379
Ed Ray 438
1 Vern 230
2 Eq Ca 301.

Powell 470
1 Vern 95

Powell 471-4
Cowper 378
3 Bac Abr 192
2 Bl Com 379
3 Atk 431
2 Atk 158
1 P Wms 729

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paid out of the Lands if the Personalty fail, and in this case the Heir and Devisee are bound jointly.

3 Bac. 27
2 Ch. Cas. 378.

Before the Stat. of Devises selling and alining, before action brought, be held to the exclusion of Creditors. This Statute is construed liberally.

Rawle 473
2 Atk. 375.

This Statute being made merely for the sake of Creditors and not at all to favour a Devisee at Law it has made no matter of distinction but barely between the Creditor and Devisee, and to the Heir and Devisee the Law is the same as before.

Rawle 474-5.
2 Atk. 438
3 Co. Litt. 19

Therefore if an bond Creditor come upon the real assets he shall resort to the Land descended and to the Devisee. For the Heir is only entitled after all debts are satisfied.

Comp. Jar. Parol Evidence may be admitted to explain or controul the Devise.

Every Instrument in Writing consists of two parts viz. matter of fact and matter of Construction of Law.

Rawle 477
8 Co. Rep. 155

The former may be proved by the parties in whose Instrument and is admissible even as after the Instrument was executed or before or after execution it was altered.

But matter of Law is not subject to amendment it is not touched by a Jury and there-

for

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and therefore not prevailable as a fact. —
— Thus a Devise to A and his heirs. what Estate A takes is a question of Law. to be determined by Legal Construction. — an uncertainty of the former is a latent. and of the latter a patent ambiguity.

Powell 277
Do — 487
8 Coke 155.

It is a Gen[l] Rule that the Testators declaration cannot be given in evidence to control the application of words contained in the Devise. or to give them an import which upon the face of them they will not bear. —
This rule has obtained since Devises were required to be written. and since the Statute of Frauds.

3 Mod[r] 313
14 Ves[r] 632
Powell 345
Powell 474-
Do 501. 578
Ck Ja[s] 745.
5 Coke 68
2 P. Wms 141.

The Testators declaration may apply to the Devise or to the person of the Devisee. and in both cases they are inadmissible when they relate to matter of Law. —

Powell 478
6 Rep[s] 671

1[st] As to the import of the Devise itself.

Thus to A and the heirs of his body begotten on condition that he or they should alter. Parol evidence is not admissible to shew who were meant by "he or they" this is a matter of legal construction on the face of the Devise.

Powell 478
5 Coke 68.
2 Vern[r] 98
2 Ves[r] 210
Powell 608.

So if one devises to his Wife generally. Parol evidence is not admissible to prove that it was intended instead of Dower

Pow[l] 480. 608.
5 Coke 68
1 Vern[r] 98
2 Ves[r] 210

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Powell 480
4 Salk. 232
2 Vern. 333
Pre. Ch. 138
1 Ves. 231

So where a Devise was on a condition subsequent which was omitted by the Testator was not admitted to prove that events which had happened were intended by him to amount to a breach of the condition

Powell 480
2 Str. 815
1 Vern. 189
2 Atk. 241
2 Ves. 318

So as a Devise to a Daughter parol evidence that the Testator intended her Land to be subject to her husband's debts was not admitted

2nd As to the Exposition of the Devise the Testators declarations are not admitted as to matters of construction of Devises as a Devise to A who died before the Testator parol evidence was not admitted to prove the Testators declarations that B whom he took who was A's son A's son would have taken his Devise had A lived then there would have been no ambiguity for he stands in the place of his father

Powell 485
Reeves 334
Ch. Exch. 429

So where the Testator mentioned two rooms in the House and devised to "the" parol evidence is not admissible to shew which of the two he meant The rule is the same as to Corn Law conveyances but it is not admissible to contradict the words

Powell 488. 490
4 Leake 08
1 Str. 570
Ld. 632

Thus if one devises to his son A he having two sons of that name parol evidence is not admissible to shew which of the two he meant for the Evidence of the Testator is to be regarded

pro

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the ambiguity is latent and the declarations of the Testator can be proved for that he thought the eldest son was dead. — 8 Coke 155. 6 Rep. 63. Do — 67. 2 Vern. 216. 1 Bl. Ca. 404.

So parol evidence has been admitted to prove whether an Instrument was intended as a Deed or as a Devise. — 3 Burr. 1810. 1 Mod. 177. Paw. 490. 15.

So if a Devise is made to A the being Father and Son of that name parol evidence is admissible to prove that the Testator did not know the Father — Salk. 7. 6 Mod. 164. 1 Ld. Raym. 413. 2 Ld. Raym. 1356. 10 Coke 71. 1 Fearne 293-5. 6 Rep. 67. — 671. Paw. 337. 449. Co. Litt. 3 a.

So if a Devise to A the Testator's Son and heir at the time of the Devise and 2 Sons J. the declarations of the Testator were admitted to prove that the Son A was intended. — Paw. 498. 10 Coke — 42. Paw. 494. 2 Vern. 216.

But a Devise to the Son of A he having several Sons is void. parol evidence in this case is inadmissible. The ambiguity is patent and a matter of Construction. — Paw. 488-90. 10 Coke 155. 3 Bl. 99. 2 Vern. 524.

If the name of the Devisee exclusively to one person and the description to another it may be proved by parol that the name was inserted by mistake. — 6 Rep. 65. Paw. 498. 1 Atk. 41.

So where the Testator gave the Devisee a name which he never had — Paw. 499.

parol

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2 Atk. 240

parol evidence may be admitted to shew that the Testator knew a person and used to call her by that name till his death.

Powell 492
2 Eq. C. Ab. 416

And thus a Devise unto the poor of A in the County of B and it was in the Country parol Testimony was admitted to ascertain the Parish.

But if the person to take be not in any sort described in the Devise no evidence will be admitted in behalf of persons named to shew who was intended. Because in such case the ambiguity appears on the face of the Instrument.

2 Vern 217
Powell 508

The evidence of Mr Gould did not appear would not stand with the words

Powell 6 213

If words of Testament in Law are used parol Testimony is admitted to prove the meaning of them. This is done not so much for the purpose of effecting an explanation as to ascertain what words not understood at all in the strict sense of those words or terms

Powell 328
2 Do 400
Dyer 337
Moore 464
Hob 132

As a Devise to Servant Parol evidence is admitted to shew that the Testator intended that a Daughter can take. So where the Devise is to the Devisor's next relations parol Testimony may be introduced to shew that he knew certain Persons answering the description - but any further declarations are not receivable -

Powell 498
Vin 231

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But in these Cases evidence is never admitted to give words a sense which they will not bear on the face of them. – Thus the word "Son" – it sometimes construed to mean "grandson." But not if there is a "Son" living. But if it appear from the Devise that the word was intended to mean a Son only – no parol evidence is admitted to prove that the word Son was meant for grandson.

Parol evidence is never admitted to rectify any thing not written. –

As a Devise of £100 to Mr. Parol not admitted to shew what name is meant. –

So where the Testator ordered his personal property to be given to his Executor and it was by mistake omitted any evidence of the circumstance is inadmissible.

Courts of Law and Equity have admitted parol explaining facts to explain words of equivocal import as to the quantity of Interest devised &c as when the Testator with the Devise

Proof of the Testators circumstances has been admitted to ascertain the quantity of interest the words giving equivocal – as a Devise of the Testators whole Estate &c. &c. paying the Testators Debts. Evidence may be admitted in this case to prove that the property was not intended to pass them and therefore

Parol 408.
2 Atk 63
Do 106 & 9
Parol 398 Salk
Do 531 & 67 Ca
Do – 500 – 7.
2 Atk 318.
3 Ves 340

Parol 502
2 Atk 240
1 Ch 410
8 Vin 115.
Parol 525
8 Vin 195
1 Ch 415 & 18.

Parol 517
Do – 530.

Parol 502.
3 Keb 59

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these face that a fee must pass

15 Rep. 412
2 D. 65.
3 D. 348
8 D. 57. 302
4 D. 93

It was decided that the word "estate" can not a fee unless limited by other words.

So where the ascertain certain equivocal words, whether a Legacy of the Testator's Estate such it absolutely or for Life the being the Testator's Wife, and ever was admitted that it would not sufficient to support the words the Land the Devisee a fee or Estate

Parsons 507
Free 61, 75, 71

First, that been admitted for the same Devisee at the value of the Year's Rent

Parsons 518
Do 505
10 Rep. 127 479
2 Co. 16 b 258

A Devise to sell the Testator's property the Testator to 3 £100 per annum out of the Land. Parol proof may be admitted to shew that this sum exceeds the annual profits to shew that a fee was intended.

8 Rep. 95 503
3 Atk. 350
3 Atk. 13
3 Atk. 341

Now regulate a Devise of Land charged with the payment of a just sum Equity a fee by reason and such a Devise is unnecessary.

3rd Proof is admissible as to the Condition of the Testator's family to ascertain the application of terms which may be used of limitation or of purchase. As a Devise to A and his Children or his issue proof may be admitted as to the Condition of his children at the time of the Devise that an Estate Tail is not

Parsons 405
Do 518
13 Ves. 190
Ves. 227-54
17 Ves. 346
Parsons 781
4 Ves. 799
6 Price 176
Parsons 360

also

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4th Evidence is admissible as to the Testators personal property to ascertain the meaning of words not themselves equivocal - but which when considered with reference to the state of his property will clear and require a construction different from that which appears to be the intent — Thus John Hill devised to A. the house called Blackacre - Proof is admitted to shew that it was Tenant in Tail and that the Devisor had only a reversion in order to shew that an Estate in fee was intended. —

Parol 513
Ray 834
Hoff 744
Bull 135

No evidence was in one case admitted to create an ambiguity, where there was none on the face of the Instrument - there the words stand with the words and not with the meaning they "prima facie" convey.

Parol 513
Sug 176 n.
D° 4 n 2

But evidence which does not stand with the words cannot be admitted as when one devised to the children of A he having six. Evidence was not admitted to shew that four only were intended. — — —

Parol 524
D° — 594
D° 12 — 512.

So where a Testator devised the residue of his Estate to his Executors" one of them being indebted 3000£. Evidence was not admitted to shew that he intended to read the Debt for the residuary clause included it.

Talk 240
Sug 126
Parol 532

Devises

So where the residue of the Testators personalty was not disposed of Evidence was not admitted to shew what he intended to give the Debt. or that it was the Devisors intention that his Executor should have it.

Parol 524.

But parol testimony of the Testators intention is admissible to rebut an implication.

An Equity meant in favour of an equitable claim. But the meaning of the Rule is applied here to Devises so that what arises from the nature of the Devise Equity draws an inference which is against the legal construction arising from the words evidence is admitted to rebut or contradict the former which is in effect to establish the latter.

Parol 328
Do 328
Gilb Eq 144.
Parol 282
Do 677
Parol 323
Bag & Br 505.

A Devise of Land is devised to an Exr. but in Equity that is a resulting Trust also the surplus to the Heir & not the Executor is trusted.

In this Case parol testimony of the Testators intention is admitted to shew that he intended the Executor to have the surplus.

So where a Testator made a bequest to A and B. of 250 £ each and afterwards he directed his Exr. to pay them 250 £ in specie. Parol evidence was admitted to shew that both sums were intended to be given.

Parol 326
Ed. Rep. 1924

So where a Testator gave considerable Legacies to his Executor. Upon which the inference

Salk. 79

ari

Devises

in Equity was that he should not have the relief wch Equity was admitted of the Letters declaration that he should have it &c.

Parol Evidence has been admitted to shew that a Devise was intended as a performance of a covenant agreement, as an Agreement he made & wrote that the Testr should have an 100£ p. annum" - Parol evidence is admissible to shew that a Devise to that amount was intended as a performance.

Parol evidence is admissible in all cases to construct Words as when one devises his "Real Estate" to his Exrs and omitted to charge it with an Annuity vested to A which the Testator promised to pay it. Parol evidence was admitted.

A man gave his Estate to his Wife & to all his Children and named them A.B.C. & D. but omitted the name of one in this case it may be proved that his name was left out by accident.

An Estate is given to "A and his Children" if A has no Children at the time it vest he has an Estate Tail. if he has it vest he have and then Repatted Parol evidence may be admitted to explain the ambiguity that exists.

Powell 517
2 Vern 677

Powell 519
2 Vern 500

Powell 530
2 Vern 500

15 W^m 974
2 W^m 136

6 Ves 71
3 Rubl 49
3 Burr 1898

Devises

A ... may be explained by
1 Salk 234. parol and parol evidence may be admitted
2 Lev 18 to explain words not equivocal nor
2 Ch. Ca. 418 alluded by any parol agreement as if a
Do 472. devise to Friendly use affix unreasonable make
the Devise void or ridiculous.

If A leases a mortgaged Estate his heir
2 Vern 250 may use the purchase estate to defeat
Salk 23 the Mortgagee but parol Testimony may be
admitted to shew the Testators intention that
they should take it "cum onere"

If there are reputed Legacies & no
parol evidence may be admitted to shew
the Testators meaning — The rule now is
if the Legacies are in the same instrument
they are not accumulative unless the
to the Legatee if one is in a Will and the other
is in a Codicil they are accumulative

If there is a Legacy in a Will of 100£ in
money, and 100£ in some other thing not
accumulative per Judge Reeve

Revocations

Will and Testament are not
Comb 350 confirmed unless the Testator dies and
3 Mod 252 the thing are revocable by law

Revocations may be considered under
two heads.

Devised

1st At the Com. Law before the Statute of Wills. — 2nd As they now stand under the Statute. Powel 332 Dº 129

1st Revocations at Com. Law are of two kinds expressed and implied. —

Expresse revocations must be either by

1st By Writing as by a subsequent Will or Codicil expressly revoking the former — or

2nd By Parol as by one having made a Devise expressly declared and made it void, words directly to that purpose.

But in this case it must appear that the words used import a mere revocando — wherefore when the Devisor said because the Devisee did not visit him he should not have the Land but nothing more had reference to the Devisee it was not considered as revoked Powel 153 Cok. Chas 151

So words indicating an intention to revoke at a future time contrary to a revocation at Com. Law as "my Will shall not stand" or "I will alter it" — Powel 333 Cokes 597 Moore 481 Cok. Eliz 801

The same rule holds since the Statute as the case of a similar intent expressed in writing. 2 Salk. 706 Dº 245

2nd Revocations at Com. Law may be implied revocations of the same act or declaration furnishing ground to presume

Same

Daniel

Paul 333 / 1 Vin. 387 / 1 Bacon 253

seems that the Testator intended to devise it charged - This is a revocation in Law as if Lands devised to a Stranger he says "my Son shall be my Heir"

Pau. 337 n 3 / Do 337

The acts of the Devisor amounting to a revocation, must be in writing as the Statute.

Paul 335 / 3 W. 311 / 3 Mod 206

by Writing as if one having made a Will makes another inconsistent with it, the former though not expressly revoking it, is amount to a revocation in Law.

2 Atk 318 / 2 Atk 375

It is said that if one devises Land to A in one part of his Will devises them to B Now B take entire. But it seems not to be so in a different degree for then the latter revokes the former.

But a subsequent Devise not containing express words of revocation does not revoke a former unless inconsistent with it therefore the case of that a Devise expressly to A for life & after his decease to B will not compel the Court to declare that the former is revoked for the latter may relate to a different subject matter or it may confirm the former

Paul 338 / 3 W. 497 / Cowp 87 / 2 Eq. 488 / 2 Bac 343

But Marriage is construed that the latter is different from the former if it is not agreeable in that that different & will be a revocation

Paul 341 / 3 Atk 337 / 1 Ves 33

So also a Devise inconsistent with a preceding Will. works a revocation

Devises

A distinction as to the effects of revoking by a Codicil and by a subsequent Will has been taken. "Viz" that the Codicil being a part of the Will and not in its nature intended as an instrument of revocation does not revoke unless precisely in the degree expressed

Thus a Devise of Land to B. Grand Daughter for Charitable purposes and by a Codicil it is devised in the same trust to four persons including the same three the Trust is not revoked. Thus it is said by "Powell" that a subsequent Will varying the distribution made in a former it a total revocation —

Powell 543
Do 18
Vesey 178
Do 185-7
3 P. Wms 345
Cas in Ch 87
Cro Eliz 761

If one makes a second Devise inconsistent with the former one under a false impression as to a matter of fact which fact is the matter for making the second and the fact supposed is found after his death not to exist the first is not revoked as where devises Land to A and afterwards by an instrument signed by A and B he devises the Land to B. Here A is alive he will take in preference to B.

Powell 540

But according to Powell a false impression will not revoke the Devise unless it is to effect a deceit "fraudulendum for the testator — "quem de hac" for he seems to mean by deceit nothing more than a mere misrepresentation of a matter of fact —

Powell 440

Levinz

2 Bac 232
2 Ves. Jr 470
Dane 4 459

If a former Devise is revoked by a subsequent one or the Testator dies that the former is inconsistent with the latter the 2nd must be void as well as the instrument containing it is ambulatory till the Testator's death Therefore by a revocation of the latter the former will be void

Dane 4 351
Salkeld 53
Doug 40
Cowper 92
2 Bac 232

But it seems that if a second Devise expressly revokes the first the revocation of the latter does not revive the first as an express revocation is considered and determined act by which the first Devise immediately vests

Dane 354
Do 532 565

2nd Acts according to an implied revocation may be by matter in fact - as 1st By an alteration in the relative circumstances of the parties 2nd By an actual or intended alteration in the Estate devised

Dane 354
4 Bac 241
Do 242
1 Vesey 246
10 Ves. 304
4 Doug 95

1st No alteration in the circumstances of the Testator except marriage or the birth of a child has been held to amount to a revocation of a Devise previously made (the Devisee being a Man)

1 Vesey 103
3 Salk 292

But tho an alteration of the circumstances is not an alteration of the Devise

Stra 1148

This is true of the child in posthumous

Dane 351

The reason of the rule is that from such a change of circumstances the Testator is presumed

Devises

presumed to have changed his mind with regard to the disposition of the property. 2 Ves. 337 Doug. 34 2 Ves. 441

Here any evidence either written or parol is admitted to prove that his intention was not altered (i.e. to rebut the presumption against him) as his declaration. Doug. 354-6 Doug. 31-5. 2 Ves. 522 2 Earl. 530-43 1 Eq. Ca. Ab. 413

So where a Testator devised his Estate to a person whom he afterwards married and gave only a Legacy to his Brother such a change was held not to amount to a revocation.

A subsequent marriage only or the subsequent birth of a child only is not sufficient to revoke a Devise. But in case of a subsequent Marriage and birth of a posthumous Child the Devise is revoked. Though the conception was unknown to the Testator and "e converso" if he knew of the conception at the time of his death and an abortion should take place this would be no revocation. 2 Ves. 58.

Yet this intention would not be influenced in the former case and the latter thought and that effect can a mere intention have who have without an actual revocation. 2 Earl. 541.

According to Lord Kenyon there is a tacit condition annexed to every Devise at the time of making that the Testator does not intend it shall take effect if such a total change should happen in his condition. This principle is

Denied

That Principle is approved of by the Lord Eldon, & may take that determines the authorities

But there has been no case decided on such Marriage to have been holden to be a revocation except a fine & recovery & that the Settlor's Estate & Estate, and it seems that the Donor's Wife and Children are duly provided for & the Settlement is not in fraud of the Power of Revocation does not arise from the Marriage & the said condition is not annexed to it

Marriage & the wife not making a Will made in contemplation of such event, and providing for the future Wife & Children

But if a Feme Sole makes a Will & marries it is an English Principle well settled that it is suspended during Coverture so that if she die before the Husband it is revoked, for it is the nature of a Will or Devise that it may be revoked or confined at the Testator's pleasure and a Feme Covert has no will or pleasure

But if the Wife survives the Husband and he comes again, "dum fuit" according to Litt & Coke it revives of course

But an alteration in the personal capacity of the Devisor though such as renders him incapable of making or revoking a Power

2 Vern 530
D° - 540
2 Eq Ca Ab 341
1 Ca Ch 413
Dany 358

2 Eq Ca 530
Dany 39

1 Ld Ray 181
1 Bac 292
4 Viner Ab 161
4 Coke 61

Plow 340
4 Bac 2514
Dany 307

2 Vern 43
D° - 541

does not of itself work a revocation for unless this change be that the power of revoking, therefore therefore it is presumed no change of intention — 4 Coke 61 / 1 Mod. 181 / 1 Vern. 105. / 1 Eq. Cas. Ab. 234

2nd An act in pais amounting to a implied revocation may consist in either an actual or intended alienation in the Estate devised. —

Of an alienation actually made.

In these cases the revocation is in consequence of a positive rule of Law — the intention of the Testator is not regarded, it is not founded on any presumed intention.

The positive rule or principle referred to is this. That as the devise must be vested at the institution of the Devise so the Estate must remain, the same condition until the consummation of it. it must in contemplation of Law have been in this vesting, and remain vested — Hence any alienation in the Estate between the institution and consummation of the Devise which puts it in a different light works an implied revocation. — Powell 304 / Do. — 600. / 1 Roll. 615 / 1 Bac. Abr. 314 / Do. — 316. — Powell 184. / Do. 568. 611. / 1 Bac. Abr. 567 / 7 T. Rep. 399 / 10 Mod. 516.

Such an alienation of the Estate may be either by the act of the Devisor by act of a stranger or by operation of Law. — Powell 568.

1st By act of the Devisor. A sale of land devised to a third person will revoke the Devise so if the Testator having an absolute Estate in

the

Devises

Barn & Ad 192
Dº 576
1 Roll 92
Hob 399
1 Vern 417
4 Burr 1960
7 Rep 29

in the Land alienates the legal Estate only reserving the beneficial interest or equitable Estate. thus makes a prior Devise of the Land void - as if one having devised Lands makes a Feoffment of them to a Stranger to the use of himself his Heirs the Devise is hereby revoked for the beneficial Estate by mere limitation he is a mere Purchaser.

Powell 576
1 Roll 116
Dyer 143
8 Coke 90.
1 Bar & Ad 578
Powell 569
1 Mk 570
1 Vern 440
Powell 570
2 Ch Ca 327
3 Will 16
1 Eq Ca Ab 177

So if one having devised Lands conveys them in fee and then takes a reconveyance of the same Lands. So when one having devised Lands made a Marriage Settlement.

So a recovery of Land to the use of the Testator the pending Title applies as well to equitable as legal Estates - as if the Mortgagor having devised his Eq Red. conveys it in Trust for himself the Devise is revoked.

Powell 572
2 Mk 741
2 Vern 803.
B. Par Ca 154
1 Eq Ca Ab 411
2 Vern 202
4 Burr 1961
contra
Doug 722

And the Ct have gone still further and held that if a man seised in Fee thinking he had only an Estate Tail suffers a recovery in order to confirm his Will - yet this effected a revocation.

Instead of the last Rule the following should have been inserted.

And alterations in the Estate devised which was not devised before but becomes so by the Devise revoke the Devise as when Tenant in Tail having devised conveys to Pl. for the Purpose of having recovered the land to himself in Fee the recovery is adjudged that the Devise is revoked.

Powell 583
3 Equity 108
3 Ves 103
Dº 803.
2-4 Geo 523
7 Rep 40
Dº 201.

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So if a man covenants to suffer a Fine to the use of such persons as he shall name in his Will and makes his Will and then levies the fine in pursuance of the Covenant the Will is revoked and the rule is the same though the alteration made is declared to be for the purpose of giving effect to the Devise provided the Devisee is entitled as a new purchaser. — Powl 556 2 Atk 579 Mgou 789 1 Roll 414 2 Rep 578 Do 999. 399.

Still if a man seised in Fee but subject to the having an Estate Tail only suffers a recovery to confirm his Will it is revoked. — Powl 582-3 3 Atk 808 2 Hobt 323

A Specific Devise of a Lease for Life is revoked by a subsequent surrender and renewal of it. — The same rule holds as to a devise of a Lease that is renewable — Powl 583 1 Peyton 379 2 Peyton 118 3 & 4 Wm 163 Powl 585 2 Atk 373 Rue Chy 317 2 Vern 418

But Leases for years being Chattels interests may pass by Devise notwithstanding subsequent renewals of them if proper words are used for that purpose as if I devise all the estate that I shall have in such a Lease at my death — 3 Atk 174 Salk 337 1 & 2 Wm 573 Powl 589

So if the renewed Leases in Case of this nature are not compleat at the death of the Testator the previous disposition will not be affected by the surrender. — Powl 592 2 Atk 593

And when the revocation depends upon the simple fact of an alteration in the Estate independently of any intention to revoke there must be an actual and substantial

Devises

alteration or there is no revocation. This
Forr 493 was formerly holden that if one devised Lands in
Fee and afterwards Covenanted to convey to a stranger the Devise was not revoked by the Covenant

But now as Ct of Equity considers an exe
Pawl 494 cutory agreement to convey Lands as an actual
6 Rep 39a conveyance. Such a Covenant or agreement
Do 38g will in Equity be a revocation if the Covenantee
has a right to a specific performance.

But a Devise of an equitable interest in
Pawl 495. a Trust Estate is not revoked by a Change of
16 L Rep 23 Trustees. There is no alteration in the Estate de
2 Do 107 vised & as in the equitable interest.

So if one having contracted for Land devises
Pawl 590 it and then completes the purchase. It is no
Dan 684 revocation the equitable interest is not altered.
Do 691

So if the Mortgagor devises his Equity of
Dan 684 redemption. and the Mortgagee reconveys the
Do 710 legal Estate to a Trustee for the Mortgagor it
Pawl 597 is no revocation.

And it is laid down as a gen
Pawl 509. eral rule that if one has an equitable Estate
1 Will 311. in Fee and devises it and then takes a Convey
2 Ves 609 ance of the legal Estate the Devise is not revo
1 Roper 616 ked. There is no alteration in the Estate devised.
7 Rep 41

Where several instruments taken together
1 Ch Rep 105 do constitute but one Conveyance a Devise
Do 103 made in the intermediate time between the

the execution of the Deed and the completion of the Sale is not revoked for all the parts of such a Conveyance will be considered as Constituting one whole by reference to the Deed. — Parsons 600 1 Atk. 251 2 Burr 1131 4 Burr 1902.

A partition between Tenants in Common and Coheirs is confined to the object in no revocation of a previous Devise by one of them: thus it no alteration in the Devised Estate. It must ascertain what before claimed to him or to the Deed. — Parsons 602 1 P. Wms 170-3 Hubb. 354

But if the Deed of partition extends to any other object than that of partition only it will revoke a previous Devise as if it contains a further disposition of the Estate. — Parsons 603 1 Williams 309 3 Atk.s 742 Do. 745-58.

When one has made an actual alteration in an Estate before devised no parol testimony is admitted to shew that he did not intend to revoke. for the revocation is not founded on any supposed intention to revoke but an absolute conclusion from rules of positive Law. "praesumptio juris de jure." — 2 Vern. 479 Do 695.

2nd Acts in pais amounting to an implied revocation of a prior Devise may be by an intended alteration in the Estate devised as if the Devisor attempts a disposition which is ineffectual either for the want of formality or the want of capacity to take in the person to whom the disposition is made. — Bacon 615

L

Powell

Paul 1045
D° 315
Moore 829
Paul 188

A release one Joynter doubted Land makes a feoffment & it without Livery & Seizin or Lawful Deed a Reversion makes a grant & it [illegible]

Paul 607
D 308

A reversion that effected by Fine or Deed a Possession in Law to restrain the inheritance may be rebutted by Parol as where the Donor on executing a Deed of Assignment to his warrant declared his intention not to make

1 Roll 845
2 Co 62. 35
1 Bac Ab 450
Cro Eliz 190
Willes 237

So an intended alteration which becomes effectual through an exception to the Statute of Frauds proves to show it is made [illegible] having devised to A — afterwards devised to a Corporation that a reversion thereby to the Corporation can't take

Paul 600-10
3 Atk 3 pl

So a subsequent conditional Grant to one who can't take is a revocation (as to the Devisor's Wife)

Paul 911
1 Vern 324
Mod 61 340
1 Leg Ab 3
1 Roll 113

2dly — An alteration in the Estate devised made by the act of a Stranger may be a revocation as if one having devised in Fee and dies bare reverter

Paul 1120 352
2 Vern 441

But a Stranger can't revoke a Devise by tearing or cancelling it (if it remain legible)

Dyer 142-3
1 Roll 113
3 Leo 241
Paul 912

3dly An alteration in the Estate devised as mortgaging or a Revocation may be by mere Operation of Law. thus a Devise made and not executed before the Statute of Uses is revoked by that Statute.

Devise

A Devise may be revoked absolutely in Equity as well as in Law or partially in whole or in part altho' if the revocation only in part the rest will stand. Powell 514

Of Conditional and partial Revocations

A Mortgage in Fee though in Law an absolute revocation of a prior Devise is now considered in Equity as only a conditional revocation "pro tanto" viz to the amount of the Debt secured so if the Devisee will pay the Debt he may take the Land

Powell 514
1 Rom 515-17
Dyer 143a
1 Vern 333
2 Salk 158
3 Atk 748
3 Atk 805

So if the subsequent condition was an absolute conveyance to an Executor that he might sell the Land and satisfy the Debt and account with the Heir for the surplus

Powell 519
1 Ec Ca 410
Freeman 111
Pre Ch 192
2 Atk 148 2 Ves
3 Vernon 441
3 Bro P C 344

But a Mortgage for a Term of years only is even at Law only a revocation of a Devise in Fee for the time the revocation lasted. In Equity it is only a conditional revocation "pro tanto" so that the Devisee may take it immediately on paying the Debt

Powell 517-8
1 Vern 450
7 Ves jun 400
3 Atk 748

But a Mortgage of Lease in Fee or for years even is an absolute revocation at Law as well as in Equity at in Law of a prior Devise and a Mortgage inconsistent with it.

Powell 518
Pre Ch 514

That a Mortgage in Fee is no revocation see Revocation "pro tanto" may extend to the whole quantity of interest devised as

3 Bacon Abr 535
2 Vesey jun 11 606

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Powell 623-4
1 Roll. 616
6 E. 6 Cha. 23.

as the Subject matter. thus if one devises in fee upon a Warrant to survey for Sale the Devisee only, goes and the Estate for Sale is during the Sale of the Lessee

Powell 624
Comyns 90

If one devises an Estate tail in Fee and a Warrant devises the same Estate to Him & the second Devisee enters the former notwithstanding the Difference between the two.

Powell 624

If one devises an Estate conditionally upon a Warrant & surveyed the condition upon Execution ceases & vests the Devisee absolute

Cro. Ja. 49
Powell 625
5 Rep. b. 656
34 Hen. 8. f. 41.

But a Lease by a Stranger in case a revocation of the former Devise — yet a Lease of the Lessee to the Devisee to commence from the Devisal death is a total revocation the Devise and Lease are inconsistent —

Cro. Ja. 49
Dr. 624.

But a Lease to the Devisee to commence in the Life time of the Devisor is no revocation for it never determined before the Devisee entered and so stood with the Devise.

As to the revocation & annexing subsequent matter — if one devises Blue Manor to A and then devises it to B the first devise is good as to the other — one devises Lands to his Executrix and afterwards on the marriage settles part of the same Lands on the Devisee & provides for the rest.

2 Vern. 720
Powell 627
1 Roll. 617
1 Cro. 412
2 Dr. 711
2 Ch. 368

Devises

Of Revocations under the Statute of Frauds

Viz Statute 29th of Charles 2nd

This Statute provides that no Devise shall be revoked nor lost by some other Will or Codicil in writing declaring the same to be revoked or by burning tearing or cancelling or unless the same be altered by some other Will or Codicil in writing signed in the presence of three witnesses declaring the same to be void. Powell 678 Fearne 129 Chas 2nd

It is holden that the Statute extends not only to Devises of Lands strictly so called but also to Leases of Manors charged on the Lands &c. & are to be revoked in the same manner. Powell 630 2 Mk. 272

It does not effect implied revocations as such as are effected by a subsequent inconsistent disposition of Marriage and the birth of a posthumous Child - It relates to explicit revocation only, the former remain at Common Law. Powell 630 Cartw. 81.

Revocations under the Statute may be by some other Will &c as prescribed in the 1st Branch of the Clause or by burning &c as prescribed in the other. Powell 631.

In pointing out the two first modes of revocation the Statute seems only to be declaratory of the Common Law except that the word "Will or Codicil" in the first Branch

of

Devises

of the revoking clause are construed to mean such a Will &c as would be a Will & Devise without the first devising clause for a Will & Devise not containing one of the sort would be void, &c

Paul 647
Dº 632

Whereas the instrument contemplated by the last Clause not being referred in construction to the words "Will &c" in the devising clause is construed to be an Instrument of revocation merely, should not answer the Testamentary purposes provided in the devising clause as

Paul 678

there pursuited in the first Clause of the revoking clause

So if it complies with the requisites in the devising clause it is effectual according to the first Clause of the revoking clause but if it is attended with the requisites of the second clause of the revoking clause it is good according to that clause

Paul 631
Dº 647. 667
13 Wm 643
11 Mod. 467
Sug 6th 460

But if the latter instrument is intended to be a disposing or working one it will not be effectual unless it conforms to the directions &c attested in the first part of the clause &c

2 Atk 272
1 Ves 64. 407
Paul 648
Dº 632
3 Mod 258
Gaz in 78
13 Wm 343
Sug 6th 349
24 Car 741

For the intention is to give to the second Devisee what is taken from the first or rather to take from the first and what is given to the second

A Devise to the Testator's Son & Heirs Lands not mentioned yet duly executed no valid Devise

15 Car 12

Devised

But a disposing and revoking instrument need not comply with both clauses if it conforms to the devising clause. The revoking words are effectual within the 1st Clause of the revoking Clause. Indeed if it is a good disposing instrument it would be effectual to revoke impliedly without words of revocation (i.e. it would revoke at Com Law

Revocation by burning, tearing, obliterating, &c is void at Com Law and to effect a revocation this way it is necessary that the burning &c be by the Testator or in his presence or by his direction. There is no revocation if it is intelligible

Suppose the Devise is destroyed it has been a question whether the contents could be proved. Mr Gould thinks there is no case of the kind & Note the analogy to a Deed Cast or destroyed by time

Revocations effected by these acts are in the nature of implied revocations at Com Law. Here the acts themselves though done by the Testator himself are not considered "Fact &c" as revocations but as furnishing evidence of an intention to revoke

If we agree that an act of course may be equivalent to a revocation or not as they are done "animo revocandi" as if a Devisor should throw ink instead of sand over the

Powell 629
Do 632

37 Ken 151
2 Hill 260
1 Williams 16
Sugd 1186

Powell 633
Cowper 52
1 Ryan 346
3 Will 508

Powell 634

Devised

3 Will 308
4 Burr 2512
Dr. 2515

and the writing, as leaving two Devises should stand by mistake cancelled the whole as there is no Revocation.

But it is not necessary that the Devise should be wholly destroyed when the slight act leaving with an Intent to make it insufficient. As where one slightly tore his Devise and threw it into the fire. but if the flame or hand was not burnt but the declared it should not be his Will. —

Powell 537.
2 Bl. Rep. 1043

So if there are two parts of a Devise and the Testator cancels, tears or otherwise destroys one part "animo revocandi." — that will be a revocation of the other.

Powell 537
1 P. Wms 346
2 Vern. 742
Cowper 49
Pri. Ch. 461.

These acts depending for their effect upon the intention of the Testator amount in some instances only to a dependant relative revocation. as when done with reference to another act intended to effect a new disposition. the working effect depends on the efficacy of the other act - as when one thinking a new Devise of his Estate was completed when in fact it was not tore off the seals from his first one and on being informed otherwise extended his second and as he never completed his second Devise his first was not to be revoked. — — —

Powell 537.
8 Ves. jr. 140
1 Co. Ch. 409
3 Dr. 473
3 Ch. Rep. 155.
1 P. Wms 343
4 Burr 2515
Cowper 451

A Will partly situated in part by the Testator "animo revocandi" may be good as to the other part as where one having devised all his Estate to A. executed a second devise such as the

Cowper 812

as to the

the exception the part not effectuated remain ed good.

An Instrument made under the vesting Clause of the Statute is not valid for that purpose although there be a Signature of the Testator and Face of the Instrument unless that Signature was intended by the party to give authenticity to the resulting Instrument. For the name of the Testator Parn 647
noted on the Copy of the instrument and all 3 Levins 80.
Obliterations to particular parts will not amount to such an authentication as the Statute requires.

Republication.

A Devise if not actually obliterated or de stroyed may although revoked be revived by a Republication. for being a mutable act the Testators death. it may be rescinded, suspended enlarged or contracted as to all or any part at the pleasure of the Testator And at Parn 632.
previous to the Statute of Frauds, Parol declarations were sufficient to republish it.

Republications at Common Law were very much favoured, and of course very slight words effected a republication, for if one having made a Devise of his Land sold Hobs 118
purchase other Lands, and then delivers his Last Parn 657 3
Will as his Will. this is a new publication Dyer 143
to make the new purchase pass. Hobs 344
Dr. 418
2 Moore 48
1 Rook 81.

Devised

So if one having devised all his Land to his Executor and afterward purchases other Land and should be afflicted to sell the latter and should relate he would not sell another they should find with his other Land the Devise would be republished and the Land would pass

2 Vern. 209.
Powel 653
6 Co. Eliz 49 a
Do. 493.
Moore 404
2 Chr. Rep. 272

According to one report of the case the Testator saying, on application as above "my Will is in my Desk" "in my hand" or "in my study" - it was holden sufficient so "my Will" is in the hands of J.S. that been holden sufficient

Powel 655.
2 Chr. Rep. 27
2 Vern. 267
2 Shaw 48.
1 Rolle 617

So a subsequent settlement to the use of the first Will was holden to be a revocation. Yet the reference of the settlement to the Devise was holden to be a republication and thus to give it effect

Powel 586
Do. 650
1 Rolle 617
Carth 130

But the subsequent appointment of a trust created and paying a Legacy was holden to be no republication of the Devise of Lands

Powel 650
1 Rolle 518
Do 500 or 16

And it has been holden that the same addition of a Codicil taking away the value of a Devise was a republication because the words shewed that the Testator contemplated the Devise as subsisting, even when the Codicil related to another thing

con. Cro. Eliz 493
1 Rolle 518
1 Ca. Ch. 405
Powel 584
Do 652
3 Ch. Ca. 180
3 Ch. Ca. 165
2 Vern. 209

But the better opinion seems to be that the mere addition of a Codicil or the execution of one not actually annexed

and

Devised

and though it relates to personal property only will amount to a republication of a Devise for it is a part of the last Will and Testament which is expressed so as not and therefore furnishes conclusive evidence of the Testators considering his Will as existing and this being made an addition to it and of course in confirmation of it so far as it does not revoke it. ——————

Pawl 508. 14 Ves 148.

As to the question under the Statute of Frauds see authorities in the margin. ——

Pawl 667 27 Rep 521. 1 Cont Ves 88 Do 1 442.

At any rate the annexing a Codicil on the execution of one not attested at all conforms exactly the Devise will be a republication as "strictly confirming" &c ——————

Pawl 667 Cowp 381 Do 158 collod 88 14 Ves 443-89 3 P W 32 9

So it seems any expression in a Codicil shewing an intent to confirm will amount to a republication as "I devise this writing shall be a further part of my Will." ——

Pawl 583 14 Ves 489 14 Ves 493

Of Republication since the Statute of 29th Charles 2d.

Neither the English Statute of Frauds nor any act whatever any express provision as to the republication of Devises. But as the effect of republishing is the same as that of declaring it is holden that no Codicil or writing can amount to a republication of a Devise of Land unless it conforms with the

14 Ves 329 Pawl 30 80 Do 104 2 Eq Rep 354 1 Bro 102 collod 78 Barnard 102

)

Devises

with the requisites of a Devise. ——

Powell 664. Hein. 399. Powell 664. Carthew 381. Dr. — 160 4 Mod. 68. 2 Vent. 348. Dr. — 352.

Parol republications are not good. —— No Codicil says "Powell" can amount to a republication unless it complies with the formal and is signed, sealed, and delivered in the presence of 3 Witnesses. ——

Quere must the Testator sign in the presence of the Witnesses? It is not necessary in the original Devise. The case cited by Powell does not warrant the position. Where the Codicil was first executed and holden good tho. such execution was not adjudged necessary, the Codicil indeed should be published in the presence of three Witnesses.

Powell 666

But the new law, the Statute cannot extend to implied or constructive revocations and some Publication seem likewise to be out of the Statute where the making varies.

Powell 667 Dr. Da. 693. —

The Devises by Letters are not affected by the Statute (29 Car. 2) them for real and personal property. Nor the Statute of 43 Eliz. Com. Law. It seems no express words of confirmation are necessary to republish a Devise. It is sufficient if the Devise is virtually confirmed.

Powell 668 Hein. 680.

So also according to the Civil Law any Codicil to a Devise though not annexed, and even tho' it did not formally alter amount to a republication. If executed after

Cro. Eliz 381. 2 Ld. Ca. 78 3 Ld. Ca.

Devises

according to the Statute. Thus one devises real Estate and afterward executes a Codicil giving pecuniary Legacies made but executed it &c. &c. &c. &c.

Fawk 668
Hobey 484
1 Bac 557
2 Vern 621
Hobey 482
Fawk 676

One having devised all his Copyhold tenements the remainder then late and his Wife the remainder is a republication and the latter will pass.

Cowp 130.

Where a will not to be republished is affected by the Statute of Frauds - the effect of the republication is to give the Devise a new date. so that the Devise after publication will comprehend all such property and all such persons as it would have comprehended if originally made at the time

13 Rep 193
4 Bac 601
Fawk 674
Cowp 130
Do 158

If Devise not republished will not extend to any Estate which the Devisor had not at the time of making it

Cowp 130
1 Ves 264
2 Vern 430

Hence if one having devised all his Estate in A - purchases other Estates and republishes the latter will pass

Fawk 674
6 & 7 Eliz 493
Moore 684
Fawk 674

So also having devised all his Real Estate

27 Rep 2 17
9 Mod 48
Hobey 422
1 Ves 422

If one devises to his son A. who shall die and the Testator afterwards has another son of that name and then republishes he will take

Fawk 675
1 P W 273
3 Rec 847
5 Coke 68

So if one devises Land to his daughter in tail to the contrary of the husband

the

Devises

she then having a husband and a Second husband died and the Will is republished with no notice of his death this extends to any subsequent husband

1 Rep. 193

But the effect of a republication extends no further than to give the words of the Devise the same operation as they would have had if originally at the time of the republication — Hence if one Tenement held called A and another Tenement called B and republished B will not pass both. —

Parm. 676
D° — 684

So having devised all his Lands in A the Tenement held in B and republishes —

1 Vern. 22
Cro. Eliz. 422
Raudon 343
4 Ves. 601
Parm. 676. 686
Ray. 408
1 Ld. Ray. 267
2 Ves. 313
Dyer 337
1 Roll. Abr. 397
1 Bos. & Pul. 219

So also words introduced in the original Devise as words of limitation, cannot be republication but in order to extend as appears by the Case — as if one devises Land to A and the heirs of his Body and after his death republishes. Alienation cannot take

So also one having devised his Lands to his Son B and given a Legacy to her grandson B. republishes after the testators death it was holden that the Grandson could not take the Land for the Testator having died and the words shewed that he did not intend to devise to Grandson.

Parm. 678
3 Mod. 318
1 Vent. 345
Ray. 408
2 Vent. 343
2 Show. 63

Hence the intention of the Testator is to be collected from the State of things at the time of making the Will and not at the time of the death.

Vern. 214
Salk. 44
1 Ld. Ray. 581

Devise

A Codicil may republish a Devise as to part of the subject matter only, a testator having devised his Real Estate in two several parts to part of the Estate by settling one of them and then by Codicil made it subject to the settlement and it was taken that the other part should go to the other two. — Powell 677 / 22 Wms 329 / x

But a Codicil can give the original Devise any validity which did not belong to it before. The effect is to set it up in the same condition in which it was in the inception. — Powell 680 / Sr. 102. 116. / 1 Vern 388 / 1 Vern 296 / Carthew 35 / Holt 442 / 3 Mod 262. / 1 Burn 356 / Bl Ch 270

Hence if the Devise itself is not executed according to the Statute a Codicil which is thus executed will not confirm it

Lord Hardwicke once said obiter that if a man devised thus "all the Estate which I now hold" — and afterwards executed a Codicil the Estate will pass. Such a republication for this would have the same effect as if the Devise had been made at the time of republication — Powell 685 / 3 Atk 171

A Devise may be republished by a recognition and such republication must be by express or circumstantial mention of the Devise: as if an heir should confirm a Devise and recognise it as his act and deed — Powell 684 / 1 Ed 162 / 1 Rolle 18

A republication is the same in Law as in Equity except in cases where the Testator is under a disability to do a thing in Equity which he could not do at Law and makes a recognition thereof it is sufficient —

Devises

Of the Jurisdiction of Courts over Devises

2 East 589
6 Mod 648. 688
1 Rubey 30
1 Vern 6s 240
6 H. 6 Ca 346
3 Rolle 313

Ecclesiastical Courts have no jurisdiction of Devises of Lands nevertheless they are entitled to a prohibition lies against them for proceeding in the case of a Devise

Fort 68. 405

But if the same instrument contains a Devise of Lands and a Bequest of Chattels it may be proved in the Court for the purpose of obtaining Probate of the Bequest of Chattels & the Probate is of the whole Instrument but no other effect is given to the Devise than would attend it if not contained in a Will

2 Eq Ca 55
1 Rolle 345
1 Sid 141
6 H. 6 Ca 303
Com Ca 348
Cro El 181
Salk 323
Carthew 148
3 Atk 650
6 Co 23

1 Eq Ca 353
Rolle 315

The Distribution of an Estate testate or intestate and the Grant of Administration to the Next of Kin or Creditor are matters entirely distinct from the Probate of Wills and the Court will not suffer an Appeal to be entered on the Latter Grant on the ground that the Deceased died Testate

Fonb 60 n
D° 140
3 H. 6 Ca 14
1 P Wms 548
1 Vern 183
2 Atk 324
D° 424
2 P Wms 240
2 Ch Ca 221
1 D° 414
3 Ch Ca 188
D° 388
Prec Ch 123
Sequel to Prec
Fonb 60 n
P Wms

Fonb 60 n
3 H. 6 Ca 544
P Wms 788

Whether the Testator was competent to make a particular Will is a question to be tried by a Jury

Devisees

2nd the Issue "devisavit vel non" is sent out of Chancery and a verdict for the Issue in the Case & the Issue being found the Pl. & Plt. proceed to the Decree. The Issue above being brought out that Jurisdiction as does the proceeding in Equity cases. Fund 693. 2 Atk. 224.

But this is a difference between Chancery setting aside a Devise for fraud and ill practices and from the Devisee the benefit of the Devise? The latter may be done for here the existence of the Devise is not questioned but the Court directs that the benefit of the Devise shall stand and the benefit of the Fraud prevented Fund 696 Hob. Cas. 178 Dr. 1090 a 99

The grand difference is distinct from that over the Conscience of the Devisee. That is to agree to give £100 in Bank-bills in consideration of £5 pending Suit to his Heir and the Bill was forgot. A case may be made similar for £5 Heir for the breach of Conscience which in Equity is a Fraud. Fund 696 1 Vern. 288 1 Rep. 699.

And on a similar principle it is holden that if Heir about to prove the Devise for his own profit Children is disinherited from it by the Heir promising to make the same Provision the Suit is Compellable in Equity to perform his agreement. Fund 697 Pasch. 4

Devises

And where one devised Lands to be exchanged for College Lands &c. and the College would not exchange Ch. will decree that A shall have the Lands devised to be exchanged.

Fawc 699 2 Vern 844

In Generals questions arising directly on the words of a Devise are to be decided at Law. But Ch. may decide questions of this kind if there are circumstances requiring equitable jurisdiction

Fawc 699 1 P Wms 290.

When the Testator's intention is directed out of Ch. the Court will send the evidence and direct the issue at Law so that a fair investigation of it will not be impeded. That the Ch. may decree that one of the parties shall produce certain Deeds and writings that he shall not set up such a plea as an unanswerable defence. or that he shall admit all evidence of a Copy of the original Deed instead of the Deeds itself

1 P Wms 290 Fawc 700

Of giving a Deed in Evidence. Devise

Where Testator devises it for the purposes of the settlement still and equally subsist evidence is received in all cases. ——

Fawc 702 2 Vern 33 Ld. 72 1 Vern 174 & 176 365

And where one claiming under a Devise relied upon a Deed which Ch. established the Heir. and decreed that the Devisee should enjoy the premises

Devises

So a Devise exemplified under the Great Seal is no Evidence to a Jury in Ejectment. Powell 702 Comb 46

So the Probate of a Will in the Spiritual Court is no Evidence as to a Title of Land so as to that Part of the Devise relating to the Devise. The Proceedings are "Coram non Judice" hence the Probate of Land in that Court is not evidence even if the Will is later than such Probate it is nullity. Gyll 248 Powell 703 Ld Ray 732 Do 1 742

But it is said that a Probate of a Devise "Modus" accompanied with other circumstantial Evidence is admissible if the Devise is proved to be lost. Powell 706-7

If the Devise remains in Chancery by order of the Ct. a Copy of it is admissible for the rule of the Court. — Indeed when the Ct. with which it is lodged has Jurisdiction over the subject matter an Official Copy of the Court sufficient may be received. 1 Peake 117 Gilb Ev 174

But if proof of the allegations is required that must be proved by a sufficient Witness if either of them is living if dead that not procurable an Copy. —

If there has been a Probate of the Will is that conclusive Evidence of the Fact? — vide post. Powell 708.

At Law the Witness is sufficient to prove that all the requisites

Devises

Powell 408
Do — 716
Hyde 232.
12 Wm 741

have affected but the same may be able to testify that not only the Testator executed but that the other attested. Likewise he does not execution as the subject the Devise made

And though the Witnesses are able present it is not necessary that they attest to the Testators executing and publishing. It is even so an obliterate Witness might attest the Devise and therefore if not present to his hand and that he set it as a Witness to the Will it is held sufficient.

Powell 709
1 Bl Rep 365.
1 Burr 2234
Hyde & Shia
613.

But the testimony of a subscribing Witness which is not sufficient against the Devise of two yet two are sufficient by other Witnesses. The same rule obtains as to the Testators sanity.

Gilb Ev 264
Powell 711
1 Bl Rep 365.
Bull N P 244
Hyde 1091
Powell 732
Shower 79.

On the other hand their evidence if insufficient against the Devise is sometimes admitted against the Heir.

But the Court of Chancery will not direct an Issue to try the Testators sanity. The Testator when the subscribing Witnesses swear that he was sane at the time of the execution of the Will is presumed sane unless contradicted by some other Evidence.

Powell 712
3 Atk 28.

Of proving a Devise in Chy.

It is usual in England when a Will of Real Property is devised to bring an Issue to prove it in Chy. at first but it is of modern date.

Devisor

The probate of a Devise in Chy is in no
effect conclusive upon all the parties and Powell 714
persons and prevents it being disputed even
in a Ct of Law.

If the heir or any other person should after the decree attempt to Powell 718
contravene it Chy would grant an injunction 1 Williams 215.
against such. — — — — — —

In Comm. Chancery has no concern
with the probate of Wills.

But Chy will not direct a Will to be
proved unless the heir is first coming
in & to be found. — It has been held however Powell 715-18
that such a probate of a Devise is not 3 P. Wms 192
necessary in order to establish a particular 3 Mk & S 27
claim under it in Equity. — And though
the heir absolutely makes default yet
the Devisee will not be entitled to have
proved & decree made as
if it was contested.

The probate of a Devise
in Chy being thus conclusive it is an es-
tablished practice in Chy never to decree Powell 718
a Devise proved merely on the subscribing 1 Williams 215
Witnesses are examined for the heir that 1 Vesey 177
right to claim that all of them testify before
the it dismissed.

Devises

In Cases where the practice of Probate to declare a Devise proved on the oath of one of the Witnesses but when the Probate is no evidence of the Title

Vide the rule is the same in England if one of the Witnesses is a Second Cousin, (being a Parishioner) must be proved at a Vestry to be in the power of the Lord Chancellor to receive his evidence

2 Vern 459
Pas 713 Ba 19
1 Atk 624
Skin 174

When a Commission issues from Chy to take Depositions to prove a Devise the Devise itself is delivered out of the Court sealed up and indorsed by the Commissioners and in some instances the Chancellor has ordered the Depositions to be delivered out unopened

Stage 691
1 Atk 624
2 Atk 628
2 Rep Ca 211

A Bill to perpetuate the Testimony of the Witnesses to a Devise will not lie by a Devisee to prove the Will of a Lunatic in his life time because such Devisee in the Life of the Testator has neither just interest nor any right now but he at the time of the Bill brought and perhaps he may never have any sort of right for the Lunatic may recover his Senses, and make another Will

Pas 703
Vernon 105
1 Eq Ca Abr 234

Finis

2.50

Title by Deed by J Gould Esq
January 1812.

There are two modes of acquiring Estates in Land'd Tenements and Hereditaments viz. 2 Bl Com 241-4
1st By Descent. 2nd By Purchase.

The word "Purchase" includes every mode of acquiring Estates except by Inheritance.

Every one who holds Land must hold it by one or other of these two methods.

There are various ways of acquiring Estates by Purchase viz. viz. 5 Escheat. Occupancy by Prescription. Forfeiture and Alienation

The four first of these we never treat of as all that is necessary to be known of them may be found in Books as see 2 Bl Com 241-58-63 & 67.

Introductory remarks on Alienation in general

By far the most usual method of acquiring an Estate by Purchase is by Alienation. 2 Bl Com 287
Which comprehends every mode by which Estates are voluntarily accepted by one party and resigned by the other, or by the mutual consent of the Parties

During the early periods of Feudal Law in England a Tenant of Lands could not alienate at all without the consent of his Lord.

No

Neither could the Subject Alien for his Debts nor
1 Inst 1a 114 devise them
2 Black 287 Nor with the Consent of his Lord
Do 287-8 could he alien them without also the Consent
of his Heir either Assumed or presumptive

On the other hand the Lord of the Seigniory
2 Black 288 could not alien without the Consent or Attornment of his Tenant as that Consent was once
held. This was the origine of the doctrine of
Attornment.

During the times of Wm the Conqueror and his Sons who were immediate successors alienation was absolutely
4 Cruise 3-4 prohibited on any terms even with each others Consent

And after the right of Alienation was introduced the first Estate which the Lord himself could convey was an Estate for the
2 Bl Com 120 Life of the Tenant and this is the origine of
Do 655 the Rule of the English Law that an Estate conveyed at present to a man absolutely without the word "Heirs" is only a Life Estate

These Feudal Restrictions are now finally abolished In the reign of Henry 8th a man
2 Black Com 288 was allowed to alien a part of his Real Estate which he had acquired by purchase

But even then he could not alien Lands which had descended to him from his ancestors

Afterwards he was allowed to dispose of all his purchased Estate if it was conveyed to him his heirs and assigns.

About the same time he was allowed to dispose of ¼ of his ancestral Estate with Consent of the King.

But by the Stat[e] of Quia Emptores viz. 18[th] of Edward 1[st] all except the Kings Tenants "in Capite" were allowed to alien all their Estates —

And by Stat[e] 1[st] of Edward 3[d] Kings Tenants were likewise allowed to alien by paying a Fine to the King. — 2 Bl Com[s] 74

And by Stat[e] 12[th] of Chas 2[d] this Fine was abolished and all the antient freehold Tenures in England were converted into free and common Socage. — 2 Bl Com 277 — D[o] 299 — 4 Cruise 4 — D[o] 1[st] — 2 Bl Com[s] 77

The power of charging Lands with the Debts of the owner was given by Stat[e] 13 of Edward 1[st] called Stat[e] of Westminster 2[d] before Lands could not be taken at Common Law for debts Executors on this Stat[e] called an Elegit. — 2 Bl Com[s] 161 — D[o] 287 — 4 Bl Com[s] 418

And by Stat[e] "de Mercatoribus" all Lands were allowed to be pledged for Debts — 4 Bl Com[s] 426 — D[o] 428

The necessity of attornment abolished by Stat[e] 4 and 5 of Anne — 2 Bl Com[s] 290

Common Assurances. The Legal evidences of the alienation of Real Property are called Common Assurances, because

because they are the means by which the Land is assured to him. —

Of these there are four kinds Viz:

2 Bac 25 a
4 Cruise 6
2 Bac Abr 344
D° 365

1st By Deed. 2nd By matter of Record. —
3d By Assurances founded on Special Customs
4th By Devise. —

Assurances by matter of Record are not known by our Law. — Such are by Fine and Recovery &c.

Special Customs (pursuant to Gavel) are also unknown in the U.S.A.

The first Species of Comn Assurance is by

Deed.

1 Inst 35b
D° 171
2 Bac Abr 295

A Deed is a Writing sealed and delivered. Writing and Sealing constituted the Instrument. But that Deed dont take effect till delivery. —

2 Bac Abr 290
Mayor 234
3 Bac Abr 308

And the making a Deed is the most solemn act that a man can do with regard to the disposition of his property for it thereby estopped & he shall never be permitted to aver or prove any thing in contradiction to it. —

Co Lit 206
37 Hen 8 438
D° 441
1 Bac Abr 729
37 Hen 8 371
27 Rep 171

Therefore if A conveys Land to B of which A at the time he had not the Title but afterwd acquires it A will not be permitted to say, that he had no Title at the time & shall not avoid the Conveyance thereby. —

But if matter of Estoppel instead of being pleaded as such is only relied as Evidence it is not conclusive against the Grantor. — 3 Ent 346 — Do — 365

A Deed of Quit Claim is no Estoppel because here the party dont Covenant that he has Title — Co Litt 265. — Litt s 347 446 — 3 J. Rep s 370.

Upon this principle if one makes a Mortgage to B an action by the Mortgagor to recover the Title the Mortgagee cant deny the Mortgagors Title. — 17 Rep s 760 a.

And it has been ruled in Court that any Lessee sued in Ejectment by the Lessor cant deny the Lessors Title. — 1 Root - 77

It is also settled in England that the Lessee on an action for Rent by the Lessor cant deny the Lessors Title if the Deed is by Indenture — Litt sec 58 — 1 Inst 47 a — 3 Levins 146 — Ei. Dig 203 — Do — 306 — 7 J. Rep s 537

But if the Lease is by Deed poll the Lessee in an action for Rent may deny the Lessors title

N B A Deed executed by one of the contracting parties only is called a Deed poll. — Litt sec 370 a — 1 Inst s 220 a

If executed by all or more than one of the parties it is a Deed of Indented. — 2 Bl Com 295-6

When the several parts of an Indenture are interchangeably executed by the several parties that part executed by the Grantor is usually called the Original and the rest are Counterparts. — 2 Bl Com s 296

A Counterpart alone is sufficient evidence in Equity of the existence of the Deed — Fin Ch Ry 116 — 3 J. Rep s 465

Hut E. 1 Ch. 251 and a Conveyance by a Counterpart has been so
5 Viner 465 ruled in Ch. to be good & Law.
Salk. 287

Requisites of a Deed.

First there must
1 Inst. 35 be parties able to contract for the premises
2 Bl. Com. 296 intended by the Deed and a thing or subject
matter of the contract for. —

Just then there must be to every Deed the
Carthew 76 necessary parties and if the whole interest in
4 Cruise 13.14 the subject matter is to be granted all who
have any interest should join — otherwise there
will be no conveyance of the interest of those
who refuse to join.

And all those who are
1 Inst. 231a interested to take any immediate estate
4 Cruise 14 or any thing except a Remainder should be
parties to a Deed.

2 Bl. Com. 290 As a Gen. Rule that all persons who are in
esse no Legal disabilities may convey by Deed
that Rule however is not universal —
For a person out of possession though having
1 Inst. 214. the right of possession cannot convey to another
2 Bl. Com. 290. out of possession. because it tends to main-
tenance & the object is to defeat pretended
Titles. This is Com. Law. —

3 Inst. Com. 446. In Cont. such conveyances are prohibited
1 Roll. Abr. 100 by Statute will as also such a Con-
Do. 199 veyance under Execution. The seller forfeits

the Land so attempted to be sold one half to the State and the other half to the prosecutor. 1 Root 402 Kirby 221.

A Conveyance by one out of possession to one in possession does not come within the Stat. or the Com. Law Rule. 1 Swift 214

It is however settled in Conn. and I believe likewise in England that the owner of Land is deprived of his right to convey to a person in possession unless the possession of the person in said event to the owner. 2 Kirby 290 1 Swift 300-1

It has also been decided in Conn. and is agreeable to the spirit of the English Law that when another is in possession of one's Land but claiming under the owner, the owner may convey to another. 1 Swift 300.

It has also been determined and is also agreeable to the spirit of the English Law that the Stat. making void Estates conveyed by the disseisee, does not extend to Sales by the States. Kirby 221 D° 489.

Also Sales by the Exr or Administrator by order of the Court of Probate, don't come within the Statute. i.e. they are valid. 1 Root 489. Comstock Case D° 100 overruled.

The same Rule holds as to Sales by Guardians for their Wards by order of Court. 1 Root 491

Also Sales by a Collector of Taxes for the purpose of satisfying Taxes are not within the mischief of the Law - Many to the owner is out of possession. 1 Root 491.

It has also been determined by the Supreme Court of Cons[t] that a Mortgagor out of possession whose Title is denied by the Mortgagee in possession - may sell to a third person - because he is in a manner in the power of the Mortgagee and cant obtain possession by Ejectment.

Mr Swift says - if A conveys Land to B. but refuses to deliver up the possession, and continues in adverse possession then B conveys to C. the conveyance to C is good &c - This says Mr Gould is not correct.

1 Swift 300. Gould says Swift is wrong and Gould means as does Swift

Conveyances by Infants are generally voidable only. - of Such more under the head of Parent and Child.

Idiots and Lunatics.

2 Roy[e] 1104
2 Hen[s] 291
Co Eliz 395
Litt sec 405
4 Coke 123
Jenkins 40
1 Fonb[e] 40
1 Inst[s] 247 ab.
Fitzh 6202
Combe 469

Deeds are not absolutely void. but voidable
By Com Law they Cant avoid their own Deeds. i.e. as they are not permitted to stultify themselves - because say the Books a Lunatic cant know what he does. !!!. A very unreasonable Rule.

2 Hen[s] 291
1 D[o] 303-4-6
1 Fonb[e] 434
2 Nelson 412
D[o] — 678
1 Eq Cas Ab 279
Nelson Ab 21
4 Cruise - 20.
1 Ver. 166 p. 45
4 Coke 124

The King may on behalf of the Idiot avoid it during his Life. So may the Committee of a Lunatic.

And after the death of the Lunatic or Idiot. his representatives may avoid his Deed

But though privies in blood as his heir or in representation as his Ex[r] or Administrator may

may avoid the Deed of an Idiot or Lunatic
yet a privity in interest merely as a Remain-
der man or Reversioner can't set it aside. — 8 Coke 43a — 1 Jon. 166 456

A Lunatick or Idiott Deed is void as against
his Heir or representative. 8 Coke 42a
4 Coke 125 b
Litt. sec 406
But a Feoffment is voidable by the Heir 1 Jon. 166 445
or representatives.

NB the act absolutely void is
as if it had never been at all, and is a Legal
non-entity. But a thing voidable merely
is good & valid unless it is set aside by due
course of Law. In the first case the Tenant
is a mere Tort-feasor or Trespasser — but in the
latter case he is not. —

No advantage can be taken
of a voidable act except by the parties or their
representatives. But any person may take ad-
vantage of an act absolutely void.

If a Lunatick or Idiot levy a Fine or suf- 4 Coke 124
fer a Common Recovery it is binding on him- 12 Coke 123-4
self and his representatives. — Perkins sec 24
Cro Eliz 187.

In Conn. it has been determined by the Su-
preme Court that a man can stultify him-
self and avoid his Deed &c

If a Lunatick or Idiot purchases an Estate 1 Atk 15 - 2
and on coming to himself ratifies it it is void 2 Vern 292
avoidable by his Heir.

But if he don't recover

2 Fearne 201 Explained

his understand may in his Life time. or on recovering Dam: not satisfy the Purchase his Heir may avoid the Feoffment

Sir James Cowell Sen. Sale of Hurtwood and Wife. ——

5 Coke 119

Non Estate is obtained from me by deceit he may shew the deceit & remove avoid the Grant or assent it, but the Grantee can't avoid it

By Com Law all Persons may be Grantees in Fee Simple as Infants Lunatics Idiots and Infidels. ——

1 Ass 1s 2b

Pl. Com 392 a 112. a 2 Roll Abr 797

A Feoffment by an Infant Lunatic Idiot or Infidel Purchase is only voidable. ——

1 Ass 6s 2b. Cro Eliz 439 4 Rep 3s 360

An Alien at Com Law may Purchase Lands. But the Land holds them they pass to the King or Lord paramount.

An Alien friend may hold a Lease for 2 Roll Abr 293 years of a House for the Convenience of Merchandize

Stat Ca 350 1 Swift 299

In Cont by Stat Aliens are disabled either to hold or purchase without permission by a Special act of Parliament

Then is however an exception in favour of such British subjects as owned Lands in NS before the Revolution and also of certain French subjects by the late Treaty. ——

Naturalized Foreigners may purchase and hold Lands, as they are not perfectly Aliens.

In England alienations in Mortmain are in some cases absolutely restrained, and in others restricted or limited. 1 Bl Com. 479 2 Bl Com. 256 4 Anne c 23.

An Alienation in Mortmain is one by any Corporation whatever. Strictly, though usually understood only with reference to Ecclesiastical Corporations.

In Conn.t there exists no such prohibition. — It is true however provided that such Grants shall forever remain for the purposes for which they were granted. 8 Conn.t 433

This Stat.e has however been evaded by granting very long Leases for a sum in Gross and such Leases are held good by the Courts. —

2.d Consideration.

Every Deed must be founded upon a Good or Valuable Consideration — by Good is meant Lawful. — 2. Bl Com. 296

It was not necessary at Com.n Law to express the Stat.e of Uses that any Consideration be expressed in a Deed, as it implies one. &c. 2 Bl Com.s 136

Of Consideration with relation to the Subject of Uses see in a marked margin. D.o 271-D.o 330 Perkins 533 2 Bl Com.s 296. 2 Bl Com 330 8 4 Anne 214 2 Bl Com.s 296 Christian's Notes.

A Consideration may be good or valuable and is sufficient to support a Use — i.e. to transfer the equitable estate

Cowper 9 A Deed in Equity declares no Use arises without a Consideration to the benefits of the Grantor.

Sec 2d 341 The doctrine of Uses never obtained in this State. It is therefore questionable whether a Grant without a Consideration inures to the benefit of the Grantor.

2 Hen 297 / D° — 444 / 3 Coke - 36 / D° — 83 / 1 Bos & Pul 361 / 1 Bos & P° 337 / 4 Cruise 24 A good Consideration is that of Blood or natural affection to order & near relation but extends no further than to.

2 Hen 297 / 9 Co 59 / Sec 2d - 327 A valuable Consideration is any thing of value as money - or even manufactured. Either will support a Conveyance as between the parties but against Creditors of the Grantor or subsequent Purchasers a Conveyance for a good Consideration merely is void by Statute

1 Bl Com 340 / 2 Hen 295 / 2 Com 434 / 7 Coke 40 / 2 Wilson 344 / 2 Ves 108 A Consideration expressed in a Deed cant be denied by the Grantor & his representatives.

The Grantor may impeach the Deed for illegality as between the Strangers to the Deed - as Purchasers and Creditors may deny the Consideration of the Deed.

1 Coke 176 / Hobart 151 / 2 Coke 15a / Cro Eliz 394 The words "for divers good Considerations" are considered as expressing no Consideration at all - because the Court cant judge from the face of the Deed whether it be a good Consideration or not.

But in the last Case the Grantee may prove there is a sufficient Consideration — 1 Coke 176a; 2 Coke 74a; 7 Coke 39a; 5 Coke 26a; 4 Cruise 38.

So in a Case where a specific Consideration was expressed in a Deed it was Competent in the Grantee to shew that there was an addi- tional Consideration.

Hence says Mr Gould since that if a Deed makes no mention of a Consideration the Consideration may be proved by Parol as if contained in the Deed. — 1 vol 2 Coke 76a

If it appear in a Deed expressing no Con- sideration that the Conveyance is to the Grantors Wife Child or Father no Consideration is nec- essary to be averred a Consideration is implied. — 7 Coke 39b; Rowden 304; 1 Roman Abr 368

But if a specific Consideration is expressed in a Deed another cant be implied. — 7 Coke (39b); 1 Vern Ch. 183a; 5 Coke 97a

The acknowlegment in a Deed of the receipt of the Consideration is only presumptive not Con- clusive evidence of the receipt.) — This Rule has been ruled in Ct several times — 1 Rook 470; 2 Rook 99.

3rd The third requisite is that it be written or printed. and the Com Law requires it to be on Parchment or Paper. but it may be in any Character or Language that can be read. —

Formerly Writing was not necessary to convey Lands but upon the Statute of Frauds & Perjuries 29 Chas 2nd any interest in Land for a longer — 2 Vern 310; Do — 313; Do — 297.

2 Bac Abr 305 — term than three years must be in writing
1 Bacon 72 — and all other Estates in Lands are construed to
Roberts on the St of Frauds 240 — be Estates at Will or Tenancies from year to year.

Shep. Touch 54 — The Deed must be written before Sealing and
Parkins 18 — delivery — If Sealed and delivered in blank and
4 Cruise 26 — afterwards filled up it is not good — because
a Deed always takes effect from the delivery —

1 Inst 6.225 — 4th The Subject matter must be legally
2 Bac 2978 — & truly set forth — it is however not necessary that the
4 Cruise 33 — parts of a Deed be in the order enumerated —
though it is the Usual way

The orderly parts of a Deed are Eight

1 Premises — Which Contain the names of the
2 Bac 2978 — parties the recitals Considerations & descrip-
4 Cruise 33 — tion of the Subject granted and the exceptions
if there are any — and it includes all that
precedes the Habendum

The omission of the Grantees name in the
4 Cruise 119 — premises does not vitiate the Deed if it be
1 Inst 6 — inserted in the Habendum
3 East 115 — And in such case the name inserted
Shepherd 75 — in the premises (if the right be in the Habendum
name) may be rejected as surplusage —

And where the name of the Grantee was
Salk 341 — omitted in the Premises & recited of the Grant
10 Mod 140 — but the Consideration was expressed to be

Year.

paid to him it was held to be good against him. 4 Cruise 419.

So also where a Grant was made to George the Earl of — &c and his name was John. It was good — as being a sufficient designation. The Letter being capable to but one person in the Kingdom. Co Litt. 3.a 4 Cruise 34.

It is a Civil Rule that a mere clerical mistake will not destroy a Deed such mistakes may be explained by parol — as where there was a mistake in dating and in a recital of another instrument. — 4 Rep.t 165.

A Grant to one by the description of the "Wife of A." — is sufficient to entitle him to take — even though her name be mistaken provided the delivery is to the Wife of A. — 1 Inst.s 3.a 4 Cruise 35.

In Germany a Grant to one by their Christian name only is void for uncertainty — and in this case if delivered to a person of that name it will do no good. For there is nothing to distinguish him from all others of that name.

A name acquired by reputation is good — under which to purchase or Grant. — 1 Inst.s 3.a

And a Grant may be sufficiently done to the Heir at Law either of his name — or to the eldest son of John Stiles. authorities in point

So "Issue" — is a sufficient description of "Issue of J.S." as Issue is equivalent to Children 1 Inst.s 28.a

and.

4 Cruise 35 and includes all being at the time

For the Exception to a Deed see the Title of Covenants Broken.

2.3 The next usually part is the Habendum and tenendum.

The office of the Habendum is to designate the quantity of estate conveyed — as an estate for life or the natural 2 Bl. Com. 298 life of a man or for his and their heirs forever 4 Cruise 467 Sugden

The extention of the quantity of estate may sometimes be found in the premises

1 Inst. 21 And if the quantity of estate be not limited in the 2 Bl. Com. 109 premises it may be restricted, enlarged or otherwise Dr. Ja. 23. Co. Ja. 476. qualified in the Habendum. 2 Roll. Abr. 798

2 Bl. Com. 298 So if the Grant be to A and his heirs forever Co. Ja. 476 2 Roll. Abr. 79. 23 to the use of the heirs of the body and not a fee simple executory, tail general

Moore 20 4 Cruise 354 8 Coke - 154 1 Inst. 27 1 2 Dr. 183: 399 The Rule is denied and it is held in some the Courts would take only a fee tail, and see Sugden 9 they qualify of extention in favor of the premises may be taken as in the Habendum.

But if the Habendum be 2 Coke 23 8 Coke 56 Hayden 153 2 Bl. Com. 302 clearly repugnant to the premises it is void. agreeable to the maxim of Law that the first and last Will are the best in

For further and more minute Rules on this Subject see Comyns Dig. 4 Vol. page 431 to 437.

The Reddendum formerly expressed the Terms by which Lands were held & now done the Stat. 29 Chas 2d abolishing ancient Tenures it usually follows

2 Bl Com 299
4 Comyns Dig 437

4th Next duly past is the Reddendum which expresses the Rents or Services the Grantor holds

2 Bl Com 299
Plowden 131
8 Coke 71
Shepheards 86.

5th Next past is the Condition for which I shall refer you to the Title of Estates on Condition.

6 Warranty. Whereby the Grantor for himself and his Heirs Covenants the Estate granted to the Grantee. — And if the Grantee is evicted the Grantor is bound to yield to the Grantee Land of equal value. — either by Vouchers or Writ of Warrantia Chartæ

1 Inst. s 365
2 Bl Com 300.

By vouching is meant the giving the Grantor notice to defend when the Grantee is sued by a Stranger.

After vouching the Grantee is evicted the Grantor must yield a Land of equal value. — If the Grantor is not vouched the Grantee must sue out a Writ of Warrantia Cartæ

2 Bl Com 300
4 Comyns Dig 459

Warranty may be express or implied.

In modern practice Warranties have been superseded by Covenants

Rowden 134
2 Com 304
4 Com Dig 64

7th The next part is the Covenants —
which are agreements by which the parties cov
enant to each other (and may be very various —

The usual Covenants in a Deed are
two. 1st That the Grantor is seized and may
grant 2d To defend the Title. ——

The difference between a Warranty and a
Covenant is that a Warranty binds the Grantor
and as it may be his Heir to have a substitute if
the Grantee is evicted. but never binds the Ex
cutor or Administrator

1 Roll 511.
1 Bac 378
2 Com 304
4 Com 49
D° 50. 60.

But on the contrary the Covenant the Grant
ee is entitled to demand it of the Exr. the Heir is not bound
but the Exr and Administrator.

The Land conveyed is described by metes and
bounds. and advice that description the Grant
or is not liable on the Covenants though it fall
short of the quantity described. The description
by metes and bounds have governs as in all such

1 Roll 528
2 Roll 252
1 Saund 323

cases unless express provided against. ——
This Rule obtains principally in this Country
as Lands in England are not usually described
by metes and bounds but by particular names

1 Roll 252

The rule is the same where the Deed re
fers for the description to another Deed or Re
cord though the quantity described falls short
of that referred to. ——

Monuments govern rather than length of line. when Land is granted to be a particular number of acres lying within particular monuments. for in this case the quantity is merely presumed.

But if Land is described by quantity only without metes and bounds the Grantor is liable on his Covenants if it falls short of the quantity named. 1 Swift 305

But if in the above case the words "more or less" are used, as 100 acres more or less lying in N. the Grantor is not liable on his Covenants for a deficiency. for these are words of alternation. and are now generally inserted. 1 Swift 305.

8th The eighth or last part of a Deed is the Conclusion which mentions the execution and the date. — In an Indenture the date is generally in the beginning. and in a Deed poll at the conclusion 2 Bac. 304.

The date is in strictness no part of the Deed itself, but merely a written memorandum of the execution.

Anciently English Deeds contained no date at all. nor until the reign of Edward 3rd. So now a Deed is good without a date. It is however best to insert the date. though the time of execution may be proved by parole Chitty on Bills of Exchange 43 4 Rep. 337 1 Burk. & Saun. 33 4 Cruis. 33

So that the date now though inserted is only "primâ facie" evidence of the time of

1 Inst 46 Dyer 28 Salk 462 3 — in execution because the date may be always contradicted by parol, as if a wrong or impossible date, or no date at all is inserted the time of execution may be proved by parol

If there are two Deeds of the same date between the same parties and containing the same agreements as for the same purpose that which best supports the intention of the parties shall be presumed to be first

1 Burr 1067 4 Comin 34.

5th Reading is the first requisite to a Deed.

If the party writes to leave it Deed it will be void as to him until read - but if read and he mistakes the nature of it and does not refuse it shall as to the Law it is at his peril as if Deed is duly executed — But whether a Deed is executed according to Law is always questionable by parol

2 Vern 30 Moore 184 4 Comin 27

If the party is able to read he ought to read it himself, if he is not & must have it read to him & he requires it but if he can read & will execute it without either reading it himself or causing it to be read to him & he is bound by it, & he adopts the contents as his own and cannot plead "non est factum" after signing

2 Coke 311 D° 27 3 Hen 304

If the Deed be falsely read when required by the party it will be void as to him at least as to the part which is read falsely and equally the whole unless it appear it was falsely read by collusion and on the consideration or execution of the deed for the express purpose of avoiding it

2 Coke 9 Moore 184

4 Comin 22 2 Vern 304

6th Sealing. The 6th requisite at Com. Law is Sealing. and by Statute of 29th and 30th Car. 2. Signing is also required. — 2 Bac. Abr. 365. 6 2 Wilson 20.

Signing was not necessary at Com. Law and for that very obvious reason that when the practice of making Deeds was introduced few could write. Seals are therefore adopted. — 2 Bac. Abr. 365. 6 Com. Dig. Fait. F. 3. 1 Bl. Com. 305.

At that day there was a propriety in Sealing as every man then had his distinct Seal. but the reason for doing it now has ceased

In Conn. Signing is necessary by express Statute as well as by Stat. of Frauds & Perjuries — St. of Conn. 653.

One person may authorise another to execute a Deed for him but it must be done in the name of the Grantor — 2 Ray. 1418. Shep. 4. 705. 2 Caines 142. 9 Coke 76. 6 Mass. Rep. 177.

If the Deed be executed by the attorney in his own name and not in the name of the Grantor it will not bind the Grantor — Shutty on Bills &c. 247. 356. 75. Shep. 405. Do. 9. 55. 9 Coke 75. 11 Mass. Rep. 181.

But an Attorney or Agent can bind his principal. not one partner his Copartners by Deed. but by authority given by Deed. — 4 Term Rep. 313. 7 Term Rep. 207. 1 Ves. 56. Com. Dig. Fait. F. 14. Attorney C. 15.

And this because as he can bind himself by Deed without Sealing. he sole can create an authority to do it without the like solemnities as he could he might evade by circuity the requisite of Sealing &c.

And it has been lately determin-

ed

4 Rep. 318. Lately determined that if one executes a Deed for another and in the presence of the party it is good. - it is considered as done by himself and this rule is necessary, otherwise one unable to execute himself could never make a Deed.

5 Coke 23. Shepheards - Touchstone — 71 —

If several are named as Grantors and only one seals and for himself alone it is his sole Deed only

7th The seventh Requisite to a good Deed is that it be delivered.

2 Roll Rep 30 [illegible]

Even Deed to be a Deed must be delivered it doth not take effect at all until delivered

Hob 339 2 Roll Rep 30 2 Coke - 4 Shepheards 58 Do — 72

Even Deed takes effect upon the delivery, whatever the date may be.

Shepheards 72.

So if a Deed is made and dated during the Grantors minority but sealed and delivered after he arrives at full age it will bind him.

2 Roll Rep 30 Perkins 130 4 Cruise 28

If a man seals another's Deed and the Grantor delivers it he is bound by it. he thereby adopts the sealing as his own.

Shepheards 58.

But if a Deed is delivered before it is sealed it cannot take effect as a Deed and is void

Shepheards 58 6 Coke 137 Dyer 36 Do sec 49

As the act of delivery may without words by the Grantor be effected by the one hand so on the other hand a delivery may be effectually by words only without any [illegible] delivery.

It is not necessary that there should be an actual transfer of the Instrument from the one party to the other. — 1 Just.[a] 36.[a]16 Cro Eliz 122 356 4 Cruise 28

If the Grantee in the presence of the parties takes a Deed without the Grantors direction or consent it is not a good delivery unless it be found that the Deed was placed there that the Grantee should take it. — Shepherd 58.13 1 Leonard 146 Com.[s] Dig.[t] Fitts Ab.[t] 3 +

A Deed may be delivered to the Grantee in person. — to any person authorised to receive it for the Grantee or to any third person. in the two last cases however the Deed is to be delivered over to the Grantee. — Shepherd 57-8 Perkins sec 137 Dyer 167.

A Deed can't be delivered to have any effect more than once. for if the first delivery has any effect at all (i e) if the first be only voidable and not void - a subsequent delivery will be void. But if the first delivery be absolutely void (as by a Feme Covert) the Deed may be effectuated (as after the death of her husband.) — Shepherd 60 Perkins 154 3 Burr 1805 Cowper 201 4 Cruise 20 D.[o] — 24-29

So if a Deed once good become void by matter "ex post facto" — as by the loss of the Seal a second sealing and delivery is good —

But if an Infant deliver a Deed. and come of age. full age delivers it again the last delivery is void. So also if a Deed be drawn by husband. a second delivery after the husband is removed. is void. — 4 Cruise 29 Perkins sec 154 Shepherd 60 Vinn Abr.[t] Title Fait.[t] K.

The meaning of above Rule that "a Deed can't be delivered to two or more effect more than once" is that the second delivery is void as a Delivery i.e. it serves only to confirm the first delivery but a delivery void in the beginning cannot be confirmed [illegible]

A Delivery may be absolute or conditional When a Deed is delivered to the Grantee himself (or to a third person but to be delivered over to the Grantee without a Condition) it is absolute

2 B Com 307
1 Brit 36a

But if it be delivered to a third person to be delivered over to the Grantee on the happening of a Contingency it is Conditional

Antiquities supra.

Escrow In the last case the writing delivered over to a third person to be delivered on Condition is called an Escrow

The 1 Rule 54
Co Litt 137
1 Brit 36a & 3
Cro Eliz 520
Do 584
Courtenay Spinnes
Cro Eliz 835
Moore 667

It seems to be agreed by the weight of authority that a Writing can't be delivered as an Escrow to the Grantee himself, because the Deed takes effect on delivery only and it then becomes absolute & complete — Therefore the Grantor can't say that he delivered it as an Escrow. * [illegible] next page

1 Roll 87

It has been so determined in Comm. Law

So a Bond or other Specialty or in Comm. Law Notes delivered to Arbitrators to be delivered over to the prevailing party is an Escrow

But if the Grantor on delivering over the Deed to a third person says "I deliver this to you as my Deed to be delivered over on a certain Condition" it is not an Escrow — Shepherd 57 a
1 Inst 36 a
9 Coke 137
Com Digest
Title Fait 3.
Perkins.

This seems to me J Gould a very unreasonable distinction yet it is said to be well settled in all the Books. — It has been so decided in Massachusetts.

When a Deed is properly delivered as an Escrow, it is of no force until the Condition is performed — and if it be delivered before it is — Shepherd 59
4 Louis 29
Do — 30.
mat good as a Deed. 2 Mass. It is said on last page that after viewing you can write that it was delivered as an Escrow. *

When on the Condition being performed the Writing is delivered over it becomes a Deed absolute and is no longer an Escrow. 3 Coke 35

And it is said that if on the performance of the Condition the defendant refuses to deliver over the Deed the Title will then vest by relation to the first delivery. — J Gould says this is somewhat doubtful. — Shepherd 59
Sheppard 6
5 Coke 84 b
3 Coke 35.

J Gould. In ordinary cases I take the rule to be that the Deed takes effect on the second delivery, and that the Title vests only from that time. — This seems to follow from expressions found in the Books. 3 Coke 35 a
3 Coke 36
5 Coke 84

But in cases of necessity or where there is a disability in the Grantee at the time of the second delivery, as the performance of the Condition may be of great value 3 Coke 35.

Shepherd 72
Cro Eliz 447

grant passeth." the Deed shall take effect as from the first delivery, and only by relation to the first delivery.

Authorities cited Litt 425

So if a Feme Sole delivers a writing as an Escrow and afterward marries, on the performance of Conditions, during her Coverture it shall take effect by relation to the first delivery ... the second make a second delivery

3 Coke 35
Cro Eliz 447
5 Coke 35
Shepherd 72
Litt 425
Cro Eliz 447
1 Roll 160
2 Roll 383
5 Coke 87

And if one delivers an Escrow and then dies the Conditions being performed the Escrow becomes a Deed relation to the first delivery. But where there is not such necessity the Deed vests from the second delivery.

Also if one delivers his Deed as an Escrow to be delivered over as his Deed, or his Death it will and must of necessity take effect by relation to the first delivery.

So also if one of sound mind makes a Deed of Feoffment and a Letter of Attorney to make Livery & Seisin upon it, and declares "Non Contrat. mentis." - the Livery made while he is "non compos" will be good by relation to the making of the Deed. for it is only consummating what the Grantor had before.

Cro Eliz 447
Shepherd 72 Note 1st

This doctrine of relation extends only to those cases where the second act is a Consummating act an original act for if original it can have relation to any inchoate Conveyance or former act.

Litt Sect 68
Shep 58

So if one gives a power of attorney to execute a Deed or make Livery on the Land they

they Cant take effect after his death - because it must be done in the name of the Grantor who is dead and Cant therefore be done — 1 Bac. Abr. Authority E. Perkins sec 188 Sheph. Touch 212.

But where it refers to an inchoate act it may take effect because by fiction of Law it is Considered as done in his life-time. Supra

If the doctrine of Relation would defeat the Deed it shall take effect from the Second delivery only and not by relation to the first.

Thus if one disseized shall put a possession makes a Lease or Grant to one out of possession and delivers it to a third person to deliver it over to the Grantee on his going into possession time at the Grantee is in possession at the time of the 2d delivery there shall be no relation because there could be no investiture at the time of the first delivery as neither of the parties were in possession it shall therefore take effect from the Second delivery only. Co Eliz. 447. 3 Coke 33 b. 1 Leo 48 s. Sheph. Touch 59 3 Babwood 215

But the last rule dont intend to violate the privileges of persons under any Legal disabilities or incapacity at the time of the first delivery. — As if an Infant delivers a Deed to a third person to be delivered over and the depositary delivers it over to the Grantee after the minor has attained full age — for here the depositary has the Infants interest as by the act of the Infant while an infant and might thus do what the privilege of the 3 Coke 35 a D° — 36

the Feoffee's Wife not to be found by their respective Covenants. —

Cro Eliz 165
Cro Jam 67 p.

So if a married Woman makes a Deed and delivers it Escrow to a third person to be delivered to the Grantee after the determination of Coverture. —

3 Co Rep 30 a
Shelleys 73 a.

And when a Deed does take effect by relation it never effects Collateral acts before the first relation

If a Bond is delivered as an Escrow to a third person to be delivered over to the Obligee upon Circumstances which would give it effect by relation and in the mean time a personal release is given by the Grantee to the Grantor; this will not effect the Bond, though by relation it is posterior to the release.

The meaning of this Rule is that the Deed acts retroactively on the relation Only for the purpose of vesting the right as is intended to be vested by it — & this fiction does not apply so as to affect any Collateral acts —

3 Co Rep 26 b
3 Co Rep 36 a
1 Inst 230
5 Hobart 7
Com Dig Fait
F the Confirmation B.

This relation or retroactive Operation of the Second delivery does never operate to make one a Trespasser by relation

Thus the Statute of Uses executes a Deed to B and delivers it to a third Person to be delivered over on the death — now A by covenants will not be liable as Trespasser though B the grantee may continue in possession until his death —

and

and although by relation the Deed takes effect from the first delivery — For a fiction of Law cannot make that a Fact which was before Lawful.

When a Deed is delivered as an Escrow it is considered as good until the Grantee dissents though he knew nothing of it, for the time for every man is presumed to assent to what is for his benefit. 2 Roll. 26.

If a Deed is delivered to a Stranger to be delivered to the Grantee, and the Grantee refuses to accept it upon tender he can never after claim it, unless the Grantor shall assent. His refusal defeats the first delivery. If therefore it be afterwards delivered without the Consent of the Grantee he may plead "Non est factum". — This point is not Settled. 5 Coke 119 b. 3 Coke 26 b. Fleshwood. Cro Eliz. 542. 260

8th The last requisite to a Deed at Comⁿ Law is the Attestation. (i e, the execution in the presence of Witnesses. So called because Witnesses are to attest it. 2 Bl Com 307.

This however is not an indispensable requisite at Com Law — It is for the sake of furnishing evidence of the execution or its authenticity — it is therefore no part of the essence of a Deed at Com Law tho' advisable. 4 Cruise 31. 2 Bl Com 307.

Formerly the Witnesses did not subscribe because there few could write. Hence the

Hence the ancient forms was Signed Sealed and delivered - Tho' Witness &c but the Witnesses did not sign their own names but some one done it for them.

After the time of Henry 8th Deeds were witnessed by Subscribing ——————

Then Law of the requisites of Conv. Land. —

St Conn. 653 In Conn all Grants or Mortgages of Houses and Lands must be attested by two subscribing Witnesses who must sign their names or marks.

St Conn. 653 1 Swift 307 6th A ninth Requisite then under our Law is that a Deed must be acknowledged before an Assistant Commissioner or Justice of Peace N.B. Formerly viz. before 1698 an Justice of the Peace were called Commissioned. ——

St Conn. 653 D.——654 10th Another Requisite by our Law is that no Grant or Mortgage of Houses and Lands shall affect Real Estate as Creditors and subsequent Purchasers, unless recorded in the Town Records of the Town where the Land lies - such Grant shall be good only as between the Parties and their representatives

1 Silvin 342 Kirby 72 This recording is for the benefit of third persons and to give notice to the public who owns the Lands. On the receipt of the Deed the Town Clerk is to note the day of delivery, and

and the record is to be accurate from that day though it might not be recorded till afterwards. 1 Root 61
The Deed is effectual against third persons from the date of the Record. — — —

Therefore "prima facie" between different unsuccessful purchasers the Deed first received and enrolled will hold the Title exclusively of all the others 1 Root 388 / Do 500. / 2 Root 239 / 1 Swift 368

The last mentioned however would hold against the prior Grantee if he had used due diligence to get his Deed recorded i.e. he shall be allowed a reasonable time for that purpose

In the registering Counties in England he who first gets his Deed recorded holds the Title at Law absolutely but Ch. Ch. often interferes in favour of the injured party — In Connecticut & Rhode Island neither this power nor Ch. Pow.

But if the prior Grantee delays unreasonably & a subsequent attaching Creditor will hold before him. 1 Root 388 / 2 Root 28 / 1 Swift 368.

What is a reasonable time is not settled but must be determined from the particular circumstances of each Case 1 Root 389.

If the first purchaser lodges his Deed in season but a second purchaser obtains it being recorded at length in the Office the subsequent record is void not having relation to the first, so as to exclude subsequent purchasers who 1 Root 81

who have got the Deed recorded. ——
The Question is the Deed is now to be recorded.

But the rule doth although lodged in season, not prevent from being recorded by the act of a subsequent purchaser. The Grantor or any third person or by the negligence or fraud of the Town Clerk — The Grantee has done all in his power to do.

1 Root 61 B
Dc. - 566
2 R. 339

This rule has been often determined in our Superior Ct that a subsequent Deed first recorded shall hold to the exclusion of a prior Deed not recorded even though the subsequent purchaser had notice of the first Deed. ——

1 Root 81
Dc. - 81

vide Swift's Opinions in 1 Swift 309.

All Grants the construction of the rule in doubt full — the recording is only to give notice and the second purchaser left to be charged as fraud.

Fraud not to be made a question under the Law but left to the discretion of a Ct of Eqty. as it is in England. in Ct of Law and decided the same in England as in Conn Ct both Law & Equity intermixed here in Conn. — How this question would be carried in Eqty and trust it would be decided according to the English decisions on Eqty.

1 Eq Cas Ab 358
Finch 346
3 Atk 645
1 Ves 171 33
14 Ves 68
Cowper 712
2 Atk 275

The Town Clerk after having recorded a Deed for record may not except at his peril deliver it out without recording it at full length and if he should even though at the request of the parties he is liable to any third person who

2 Root 85

can

who can shew himself injured by it, ---

So too if the Town Clerk having endorsed the Deed conveys it from whence he may with to examine his records for evidence he is liable.

How a Deed may be destroyed or avoided

First if it wants any of the requisites essential to a Deed it is void as a Deed. --- 2 Blom 308.
Trusts as the case may be it may be good as an executory Contract which Ch^y will enforce. ---

So a Deed may be destroyed by matter "ex post facto." as by alteration in a material part by which it is totally destroyed. --- 2 Blom 308
11 Coke 27.

But an erasure or interlineation if made before the delivery of a Deed does not vitiate it if there is a memorandum made of it, at the time of the execution. Shep Touc 55
4 Coke 26
2 Blom 308.

We have no statute in Connecticut like interlineation without any memorandum doth invalidate the Deed.

Any alteration made in a Deed by the Grantee after delivery destroys it wholly, unless the alteration be in a part immaterial, for immaterial. he is not permitted to tamper with his Instruments. and to alter it at all. from any motives even for the Grantors benefit. 11 Coke 27^a
Jenkins 234
2 Rolle 26.

11 Coke 27a
Cro Eliz 626
2 Saund 387
2 Roll Ab 26

If there be an alteration made in a Deed by a Stranger, does not avoid the Deed unless it be made in a part material or substantial. What is material & shall avoid it, now it's Construction.

5 Coke 119
11 Coke 27a

In this Case, since the Deed is destroyed by matter in fact, the Grantor may plead "non est factum."

Cro Eliz 626

If a Stranger shall destroy a Deed is liable to the Grantee in an action on the Case for damages.

2 Bl Com 308-9
5 Coke 23

A Deed may be destroyed by breaking off the Seal, or by the Grantor's delivering it up to be cancelled.

So a Deed may be avoided by the subsequent dissent of those who are necessary to Constitute it, as an Infant, a Feme Covert, Idiot or Lunatic at the Execution - as an Infant, after he attains full age, or a Feme Covert after the Coverture ended.

2 Bl Com 308
2 Bac Abr 103

Also a Deed may be avoided by the Sentence decree or judgment of a Court, both at Law & Equity, which in Equity may be in a great variety of Cases.

For the several kinds of Deeds see Blackstone

Construction.

Every Deed is to be Construed

3 Atk 136
Cro Eliz 36
Plowd 85a
5 Coke 18

as near the apparent intention of the parties at the time of Execution as the rules of Law will permit.

Thus mistakes in Names will not vitiate a Deed of the Grantee

The Construction should always be on the whole Instrument and not on an insulated part. If it is in the Construction of any particular part reference should be had to every part - so that if possible every part may take effect.

Powdw 160-1
4 Cruise 410
Shep Touch 87.
Litt Sec 283.

Another Rule is that Words are to be taken most strongly against the Grantor who uses such ambiguous words and most favourably for the Grantee.

Shep Touch 87, 88.

In Deeds if two Clauses are repugnant to each other the first is to operate and the latter is to be rejected. - Not so in Devises -

1 Bac Ab 299
Shep Touch 88.
1 Vern 30

Words of general release standing alone are to be construed generally. - But if they are preceded by a particular recital they will be restrained by the particular recital. - - - -

3 Levinz 269.
Hob 71.
1 Wms 390
Bac Abrid.
Shep Touch

Where the words of a Deed will bear two Constructions one agreeable to Law justice and right and the other not the first is to be adopted

1 Bac Ab 22
1 Bac Ab 183
4 Cruise 417

Words which are repugnant to the general tenour of the Deed and obscure intention of the parties are as a Gen rule to be rejected. - - -

3 Mod 135
Shep Touch 85.

Where any Subject is granted all the means necessary to attain it passes with it - - - -

2 Bac Ab 36.
1 Bac Ab 56.

As if one grants Land lying in the middle of his field he grants a right of way to it. &c -

Shep Touch 89.
11 Coke 52a

So if one grants Trees in his Land he grants a right of entry to take them away — or a mine he grants with it a right to dig it —

2 Bl Com 174.
Shep Touch 89.
Litt Sec 332.
D° — 329
4 Coke 86 b.

On the same principle if one grants Tithes in his pond the Grantee has a right to go on his Land to take them —

Generally the grant of the principal carries with it the Incidents or accessory — —

Shep Touch 89.

So also if A grants a Mill to B. he grants with it the water-course without which it is good for nothing

Or a Wood he grants all the ways or passages to it where nothing is said about it —

A Deed drawn in a form in which it cannot by Law take effect may still take effect as a Deed of another kind in order to carry into effect the intention of the parties — "as the case will allow quam proxime" — — as — —

As if a Tenant for years makes a Grant to his Landlord this operates as a release of his part.

Shepherd 79.
2 Coke 35.

So a Deed or Grant by a particular Tenant to the Remainder man is a Surrender — —

Cas Ca 600.
2 Wilson 75
1 Ld Ray 301

And a Covenant for a pecuniary Consideration to stand seized is a real Deed if with the proper requisites — or

Or a Covenant by a Creditor never to sue his Debtor is a release or discharge of the Debt

A Deed made by Several of a Thing in which one only has the Sole interest is the Deed of him only who has the Sole interest. — 1 Co. Litt. 514. Perkins sec 66. Shepherd 842. 2 Rep. 47 b.

When the terms of a Deed are such as that the intention of the parties cant be discovered at all the Deed is void for uncertainty. — Hobart 313. 4 Cruise 425.

There are certain cases in which a Deed is void in part and good in part. So there are other cases in which a Deed void in part is void "in toto" — of course. —

If a Deed contains stipulations some of which are Lawfull and some unlawfull the latter are void and the former are good. — 11 Coke 27 b. Shepherd 70.

There is a distinction at Com Law and Statute

If any of the Covenants or stipulations in a Deed are void by Statute all are void. of course but if one only at Com Law is void the rest are good. — i. e. as Ld. Chief Justice Wilmot says the Statute is a Tyrant and there he comes all alike falls before him. — but Com Law is a nursing Father which preserves the good and rejects the bad. &c &c. — Statutes are construed strictly and extend over the whole. but the Com Law construes only the ill part and leaves the rest. — 2 Wilson 351. Hobart 14. 1 Bl Com 199. Dr — 206.

If a Deed contains two distinct parts or Clauses one of which is read truly before the exec. and the other falsely. 1st is good & 2d is void. — 11 Coke 22 b. Shepherd 70.

These rules Each apply when the Clauses
Sulphin 70. are Connected and depending upon each other
but all must be of one Character either good or void

But if a Deed Contains Several distinct
and independent Covenants and any one of
Shepheard 71. them is illegal, the Deed is adjudged "in Law"
11 Coke 28 if in an immaterial Part by the Grantor
in a part material by a Stranger, and the
Grantor may plead — "non est factum". For
the Restriction takes effect not only when de-
livered but as delivered.

If two persons are jointly bound in a Deed
11 Coke 28 and the Seal of one of them only is broken off
2 Bulst 348. the Deed is destroyed "in Law".
Cro Eliz 546
Dr — 570 But if they are bound jointly and severally
in this case it is void as to one only as they
are actually and in Contemplation of Law two
distinct Contracts or undertakings.

If there are two distinct Instruments on the
same piece of Paper and with one Seal and one
11 Coke 27 read falsely and the other not, it is void only as
Shepheard 71. far as it is read falsely. The rest is good.
2 Coke 3
2 Coke 9 So if a Deed is void as to Part of an entire
Sum, either by false reading or otherwise it is
void "in Toto" because there can be no Covenant
to pay part for 20 is read 20 Shillings — It is bad
as to the whole —

Finis.

Title by Execution by

by James Gould Esq. March 1813.

By our own Common Law Every Execution that becomes a made of subsisting a Title to Land &c. and differs entirely from the English Law which at present connected with this Title I shall take a general view

By the English Com. Law only Executions issued in personal actions against the party originally liable were of three kinds "viz" — Fieri Facias Levari Facias and a Capias ad Satisfaciendum. — 3 Cokes 11.12 Com. Dig. Tit. Title Ex. C. 1.2.3.9. 3 Bl Com 414 Do to. 418.

1st "Fieri Facias" on this Execution only the Goods and Chattels of the Defendant can be taken — 3 Bl Com 417. 1 Bac Ab. 360. 8 Cokes 171. 2 Bac Ex. C 3.

The Goods and Chattels thus taken are to be sold by the Sheriff, and the money arising from the sale is to be applied to the discharge of the Execution — 3 Bl Com 417. 2 Bac Ab. 360. 8 Cokes 171. Com. Dig. Tit. Ex. C 4.

Chattels real may be taken upon this Execution as well as Chattels personal and are to be disposed of in the same way — 3 Bl Com 417 2 Bac Ex. C 3.

2nd Levari Facias. in that the Sheriff may take the Goods of the Defendant and the profits of his Lands &c. reserving Emblements &c — 3 Cokes 11 b. 2 Bl Com 417. Plowden 441 Com. Dig. C 4 C. Com. Dig. Ex. C 3.

Execution.

Authorities supra

upon this also may be taken the Rents growing out of Lands &c and those who owe Rent may be compelled to pay them to the Plaintiff &c —

3 Coke 12. Comyns Dig. 350. 2 Bac Abr. 64.

On these two Executions the whole personal Estate of the Defendant may be taken except his military wearing apparell &c -

3 Co Comyns 418. 3 Coke. 13. 2 Bac Abr. 64. Comyns Dig. Execution C 4

Upon neither of these Executions could the Land of the Defendant be taken. they extended only to personal property or Chattels.

At Comyns Land there is no Execution against Land except one against an Heir which I shall take notice of hereafter — — — — —

Salk 368. Comyns Dig. Execution C 4

Nor on either of the above Executions could fixtures be taken or even such Chattels as were annexed to the Freehold as fences &c.

3 Coke 12. 1 Salk 258 pl 6. 2 Saunders 03 Comyns Dig. Execution C 2. 4.

3rd Capias ad Satisfaciendum. The only remaining Execution at Comyns Law in personal actions is issued against the person of the Defendant, and was allowed only where the injury upon which judgment was rendered was committed with force.

The reason why this Execution was not allowed in ordinary Civil Cases is to be looked for in that extreme jealousy with which the liberties of the subject were guarded in those early periods. With the additional consideration that thereby the Lord would be deprived of the services of his tenant

Execution.

But by Stat. 52 of Henry 3. and two or three others. that Writ is extended to actions not sounding in force between subject and subject.

3 Coke 12
2 Bulst. 63
1 Rol. 85
3 Coke 88
Com. Digest
Title Ex. C.

By the Com. Law the King might have an Execution against the Land of his Debtor by Special Prerogative

Cro. Ja. 450
3 Coke 12.
Jagner 167
Plowden 440
7 Coke 21.
Com. Dig. Ex. C.

But a subject at Com. Law could not have Execution against the Land of his Debtor

3 Bl. Com. 421.
Cro. Ja. 450
3 Coke 11. 12
3 Bl. Com. 418.
Plowden 441. 2.

The reason of this rule arises wholly from Feudal principles. for real estate upon alienation

But on a Judgment against an Heir on an Obligation of his ancestor. (by which the Heir is bound) the King might at Com. Law have Execution on all Lands which he held by descent from his ancestor.

3 Coke 12.a
Plowden 440
Do. 441. 2.
Com. Dig.
Title Ex. C.

This rule arose from the necessity of the case. the Heir was liable by Law for the Obligation of his Ancestor though not personally. his Body could not be taken and the Creditor could not take the Chattels on his Execution. as they don't belong to the Heir. they could recover the value then only by levying on the Land. yet even here the Fee could not be taken. the Land was only extended. till the rents and profits thereof should satisfy the Debt.

Plowden 439.

The above were the only Executions at Law

Execution.

Now by certain English Statutes an Execution may issue in ordinary Cases as ... vizt an Elegit by Stat. Westminster 2^d

2 Blom. 161 Edward 1st upon a Judgment for Debt &c or
3 Blom. 418. forfeiture of Recognizance &c. under this Exc.
2 Inst. 395. extends the Goods & Chattels of Defendant are not
3 Blom. 349 only to be sold as under a Fieri Facias de bonis & sued
Com. Digest and delivered over to the Plff at a valuation &c.
Ex^on. C. 14. in part satisfaction of the Debt. besides which
half the Freehold Lands of the Defendant may
be taken and extended, or held under out of the
rents and profits thereof the Plff debt be satisfied
or until the Defendant interest be expired &c.

2dly By Statute de Mercatoribus. 13 Ed. 1st
3 Blom. 420 and the 27th of Edward 3^d. all the Goods and
2 Blom. 160 Lands with also the Body of the Defendant may
2 Blom. 280 be taken; yet even here the Fee is not taken
the Land is only extended as on an Elegit &c.

So that now there is no Case in which the
Fee of Land can be taken in England on an
Execution.

The Crown at Common Law had an execution of
2 Saund. 72 81 Execution in personal actions which goes
against the Lands Goods and Body of the Defft
and which therefore differs essentially or wholly
from the English Statutes &c.

St. Com. 280 Under our Statute Law. if Goods are taken
on Execution they are to be appraised by the Sheriff

Execution.

Sheriff, on the public & esp.ly post of the Town where the Goods are taken. i.e. advertised for sale at the end of 20 days. — 1st Com.n 622.

The Sheriff here can't take Goods without a previous demand of Money — and such a seizure of Goods would be unlawful and the Sheriff would be liable to the Defendant. — 1st Com.n 200

If the Sheriff sell the Goods so taken on his Execution, and part. either before or after the day appointed, the Sale is void — 1st Com.n 282; 2d Swift 283; 1st Swift 332.

By our Law the Sheriff can't take either the Land or the Body of the Defendant if there is sufficient personal property to be found. — Surplus

It has been a matter of some doubt in this Country, as it was formerly in England, whether Money could be seized on an Execution i.e. taken without the consent of the Debtor or Defendant? it is however now settled here that Money can be thus taken — it had also been so decided in England, — the objection was because Money could not be sold, as all Goods and Chattels taken on Execution are required to be sold by Stat.e and Com.n Law &c — x — 2d Shower 164; Dany.s 219; Dy.to 230; 1 Rook 210; 2d Swift 282; Harg.ll 48. Conthop & junius

By our Law if sufficient personal property is not tendered, the Plaintiff may take either the Land or the Body of the Defendant. The reason is because the Land is not sold but delivered at an — 1st Com.n sec 4; Do. sec 6; 1 Swift 332; 2d Swift 384

Execution.

at law appears,

If the Sheriff without the direction of the Plaintiff takes the Land of the Defendant when he might have taken the body he is liable to the Plaintiff or when he might have taken personal property he is liable to the Defendant. . . .

1 Swift 333.

Our Statute on this subject is much more liberal towards the Debtor than the English Law. In England he is allowed only his necessary wearing apparel bedding and the tools of his trade. in all not amounting to more than 10£. — By our Law the Debtor is allowed his necessary wearing apparel and that of his family, his bedding the tools of his trade his arms necessary furniture one Cow. ten Sheep and two Swine. these cant be taken on Execution in Conn.

1 Conn 280
Dº 281-4.
2 Swift 282

If after the body is taken by the Sheriff and before Commitment sufficient personal property is tendered he is bound to take it and release the body. this is wholly variant from the English Law, where when once taken he could not be released on any account. — but here after Commitment he cant be released.

If he is cautioned that if the Sheriff can find personal property before Commitment he may take it though it is not tendered to him

2 Swift

Execution.

Where the ownership of property is doubtful the Sheriff is not liable for not taking it, as he has there no method of ascertaining to whom it belongs. as in England where the Sheriff has authority to summon a jury to ascertain the owner of the property. — 2 Swift 283. 2 H. 336. 438. 4 Hen. 633. Do — 648.

If the Debtor presents to the Sheriff property not owned by him by which means the Officer is affron. the Debtor is liable over to the Sheriff, — for he is responsible for what he pretends to own. — 2 Swift 282.

If the Sheriff don't take personal property enough on the first levy he may levy again. and until he gets enough to satisfy the Debt &c. 2 Swift 282

But if the Sheriff might have taken enough but don't and afterwards can find no more he is liable to the Pltff for the deficiency. 2 Swift 282.

So where he don't take the body when there is not personal property sufficient he is also liable.

If there is not sufficient personal property and the Pltff elects to take the Land rather than the body of the Defendant the fee simple may by our Statute be taken. 2 Swift 282. Section 6. 1 Swift 132.

Under our Statute all the Defendants Land may be taken. and indeed all his property as well real as personal (with the exception of the above exempted articles) is liable by our Law.

Our Statute has been extended in construction to all equitable Estates in Land. — 1 Day 70. 1 Swift 335. 2 Root 15

Execution.

Thus it has been decided that an Equity of Redemption may be taken on Execution under our Law, though it is not a legal Estate

1 Day 93

But an Equity of Redemption or other equitable Estate is not liable to an Execution in England

8 East 1807
2 Wms Rep 461

Mode of acquiring the Title to Land

Lord Coke 280
1 Roll Ab 241
1 Sid 332
2 Sid 382

First before the Sheriff can take the Land on Execution he must first make demand of the Debt at the Defendants most public place of abode if it be within the County or Sheriffs jurisdiction

Lord Coke 282
1 Sid 332

After demand thus made & the Money is not paid or personable product tendered the Execution may be levied on the Real Estate

1 Roll Ab 241

But if the Land be taken before such demand or after sufficient money or personal property is tendered such levy is illegal and void. & no title is acquired by that Execution

This demand must be returned & endorsed on the Officers return else there is no evidence of title. An enactment is made to this rule in favour of all returns made before the 1st of August 1800 because being found that Officers generally neglected to make such returns & legal demand it was necessary by a remedial Statute to protect such Titles as had been previously acquired by Execution

3 Co Ab 284

The Land being laid on the Estate taken is to be assessed by three indifferent Freeholders of the Town where the Land lies. except the Town be a party then by Freeholders from the adjoining Town. & Dost that one is to be appointed by the Pff. one by the Defendant and the third by the parties if they can agree if not then by the next Justice of the Peace. & on the parties dont appoint any the Justice shall appoint them all &c — 4 Geo. 2382-3. Dec. 540 1 Dan 109.

That it was decided that a Tenant to one of the parties is an indifferent Freeholder for this purpose — Root 141 1 Swift 335

But one as nearly related to one of the parties, as an Uncle or Nephew by Consanguinity or affinity, is not deemed indifferent — 1 Day 109.

If a Feme Sole having obtained a Judgment and Execution afterward marries she cannot appoint an Appraiser without her Husband &c — this rule appears to me (C.) very unreasonable 2 Root 15.

But an assessment of Freeholders is not good unless made upon Oath &c — 1 Swift 330.

That it was decided that a return by the Officer that the Land was appraised by three indifferent Freeholders appointed and sworn by 2 Root 143.

by E.T. justices of the Peace. was good to give Title
— this says McGould is not Correct. the return
furnished no evidence that the assessors were
legally appointed. it does not appear that the
parties refused to appoint the assessors. decide.

1 Root 141. 1 Swift 333 — By the word — "next" in the Statute is not
meant the nearest in point of locality but
may jurors in the Town where the Land lies.

2 Conn 182-3 1 Root 489 1 Swift 333. The oath required to complete the Title is
that the Officer shall carry the Execution with
his endorsement thereon to the Record of the Town
where the Land lies and also to the Clerk of the
Court from which the Execution issued to be re-
corded.

1 Root 489 2 Dev — 557 1 Swift 330 And to complete the Title it is necessary
that the Execution and return recorded by both
the Town Clerk and Clerk of the Court according by
one rule will not vest the Title to the Land be —

1 Root 531. It was once holden by our Superior Court
that a certified Copy of the record of Court and a
mere Certificate of the recording from the Town
Clerk was good evidence of Title —

This says McGould is not Law and never was
the Statute required a Copy from the Town Clerk as well
as the Clerk of the Court a mere Certificate is no
evidence in any case whatever. And before
deceased the Law must be in every point Com-
plied with. It is insufficient & must be obeyed to

Tender to the Pltff of the Judgment & Costs before the recovering of the Execution defeats the Title, or puts the acquiring of one rather

Any Estate in Lands the Pltff can take in Execution are to be assigned and set off to the Pltff in the same manner as the Land itself. 2 Root 15. 1 Swift 334.

Whatever is the interest of the Defendant in the Land both on the whole is to be taken on Execution, that is the whole interest not the whole Subject. Swift 334.

What ever been a Custom in Conn. Colony on Execution on the Crops growing, and them to sever and sell when ripe, & defendants property — this old Gould thinks is not warranted under our Law. though it is in England by a Levari Facias. The proper Course would be to take the Defendants whole interest in the Land and have it assigned off to the Pltff &c. 1 Swift 334-5 Com Digt Exn C 4 Salk 368.

If an Execution is issued against the prop only & force against Land judgment was given by default the being out of the State & Summons left with the Wife is to give Land to the Court to refund the property he takes of the Defendant returns and reverses the judgment & rather if he satisfies it by tendering the Debt &c. 4 Com. 33 1 Root 176 Do. 301 1 Swift 335 2 Swift 267

Land if Land is taken in this Case on an Execution without such bond no person except the Defendant or his representatives can take 1 Root 176

any advantage of this word.

All Executions in Conn. must be made returnable within 60 days, or at the next Term of the Court between that and the date of the Execution, tho' that time is 60 days or more. if it is not 60 days intervening it is not returnable until the next Term after.

1 Root 101. 2 Conn. 283. 2 Swift 281

Hence the law of Com. Exs. after the return day is void and no Title can be acquired by it after that the Exs. is superseded.

3 Day 1 1 Root 101.

An Exs. made by a Justice of the Peace must be returned all and wants within 60 days, because Justices Courts are always open, it is always Term time with them.

3 Conn. 283.

In England if the Exs. is satisfied it need not be returned at all. But in our Law it must be returned always whether satisfied or not.

Salk. 318 Bacon Title Executors B

Hence if the Com. Exs. is begun in the life time of the Defendant before the return day, but not completed until afterwards the whole will be good in law by relation to the first writ in Com. Pl.

2 Shaw. 85 3 Keb. 265-8 2 Bac. Ex. 63.

A Levy of Exs. here as well as in England may vest a title in the Defendants property but the Title is voidable. If the Defendant chooses to continue in possession the Pltff may bring an action of Ejectment and will recover by virtue of his Execution Title.

Aliad Executions are generally granted by the Clerks of the Court & are issued of Course without the direction of the Court in Writ, but if a new Exon is ordered satisfied or a void Levy, the Clerk can't grant a new Exon, but it must be obtained by a Scire Facias. — Writ of is generally the Course in England & here where the first Exon is ineffectual. — 1 Root 453. 2 Dev & B 281.

There are some old opinions that if the Defendant dies in Prison the Plff has no other remedy. he has taken his Execution & remedy. Lake Lowsade it is now settled to be otherwise by the Stat 1 James 1st. — Com Dig Exon F 3. 5 Coke 86-b. Holt - 60.

Tho at Com Law there is no time limited within which an Exon must issue after Judgment, but at Com Law it can't issue after a Year and a day unless by a Scire Facias. — 2 Bac Ex 776. Com Dig Exon F 4. Title Pleadr 3 B 1-5 Cro Jas 364.

At Com Law the Scire Facias was allowed in Real but not in personal Actions in which latter it is granted by virtue of 13 E 1 St Winston 2nd. — Com Dig Pleadr 3 B 1-2 1 Salk - 319.

In England as well as Ireland where an Exon can be prayed out only by one who is Party or Privy to the Judgment. — Com Dig Exon C. Pleadr 3 B 5-7. Bac Ab Exon H.

In Real actions if the Plff dies before Exon issues the Heir may obtain one by Scire Facias. On the other hand if the action is personal the Exon or Administrator may obtain an Exon by Scire Facias on a Limitation. — Com Dig Title Exon C 2. Pleadr 3 B 1-3. Bac Ab Title Scire Facias D

(Bac. Ab. 64. Hale 3 332 Com. Dig. Ch. 5. Leader 361.

But if the Eſq^re is dated before the Iſſ. death it may be executed after and without ad. fac. for the right is ascertained and the mode by wch it may justly be pursued in favour of the representative.

(Hale 188-9 2 Bac. Ab. 54

The Guardian obtains an Eſq^re in favour of his Ward, and dies before it is sued. Held the Cause is to proceed in favour of the Ward. The right is ascertained.

Against whom an Eſq^re may issue.

2 Bac. Ab. 61. 1 Lewin 30 1 Keble 92 D^o 193 Raym 20

If a Judgment goes against two & one dies before the Eſq^re is sued the Iſſ. may have an Eſq^re against the Survivor by wch. fac. ad.

3 Bac. Ab. 91 1 Inst. 260. Cro. Jac. 186.

Where Judgment be had against one who dies before Eſq^re. and who has left Land in fee simple to his Heir. the Eſq^re may issue against the Land in the hands of the Heir by ad. fac. ad.

1 Bac. Ab. 93 1 Inst. 260 a

If the Heir in this Case is under age the Guard must demur (or the proceedings must be stayed until the Heir is of age to do

Or on the above Case of the death of the Defendant before Eſq^re issued the Iſſ. may if the Plaintiff have an Eſq^re against the Defendant Eſq^re or Administrator at C. L. not in Comm^n.

Com. Dig. Ch. 5. Leader 326.

This is common & useful Law for this will hold under our Law. A defendant who dies pendente lite &c. may have an Eſq^re to bring in the Land. otherwise it will defeat our Law of Descent.

Com. Dig. Ch. 3 2 Cro. Eliz. 781 2 Mod. 218

Where Eſq^re is dated before the Defendant's death it may be executed without ad. fac. ad.

If a Judgment pass against both Husband and Wife and the Husband dies before Execution the Execution may issue against the Wife alone as the surviving Defendant.

Bac Ab. Tit. Ch. 4. Cro Eliz 518. Do 526.

Finis.

Contingent Remainders.

by

James Fould Esq. Jan 7 1812.

Hitherto Estates have been considered solely with regard to their Quantity of Interest.

They are now to be considered with reference to the time of their enjoyment.

Estates with respect to this Consideration are either in Possession or Expectancy.

Estates in Possession have been treated of by those parts who present Interest to appertain with a right of present enjoyment. — Fearne - 1 — 1 Rep. Dev. 349 — 3 Bl Com 163.

Expectancies

are of two sorts. The one created by the act of the parties called a Remainder — the other created by the act and operation of Law and called a Reversion. — 2 Bl Com 163 — vide Index

An Estate in Remainder is one limited to take effect and be enjoyed after another Estate is determined. — Vest having but one Estate or Inheritance. — The particular Estate it is must taken out of the Inheritance. — 1 Inst.[a] 143 — 2 Bl Com 164 — 3 Wood[s] 186

Plowden 29
2 Bl Com 164.

Hence a Remainder cant be limited after a Fee simple because a Fee simple is the whole Inheritance — It is sometimes said that a Fee simple may be limited in Remainder after a Fee simple defeasible. Lord Mansfield But it is not true It is not in that case a Remainder but a Substitute, in a certain event.

Fow Dev 242
Plaud 134

The word "remainder" is therefore appropriated to create a Remainder but it not indispensable.

I will now mention a few Gen Rules to be observed in creating a Remainder.

2 Bl Com 165-
Plaud 23 34
Fow Dev 242
1 Inst 143-

1st There must be some particular Estate precedent to the Estate in Remainder for the purpose of creating a Remainder. — A Term for years may be created to commence in future So if A. grant to B. to hold from Michaelmas next for 99 years, if A. so long live, this is not a Remainder, it is void for want of a particular Estate to support it.

2 Bl Com 165-

A Remainder cannot be created to commence "in futuro" Remainder being always a vested Estate, and implies that some part of the thing granted presently passes.

2 Vent 204-
Palmer 2930
Sc 1 Ld 577.
2 Wood 201
Jeans 234.
3 Coke 94
2 Wilson 166

A freehold interest cannot therefore be created to commence "in futuro" it must vest immediately either in possession or remainder.

This Rule has been considered as arbitrary, it however is not so. The reason

1st The reason in the first place is because Livery of Seisin it must say to convey this interest. - and this in the usual Deed and must speak "instanter" "in præsenti" or not at all. The object of this rule is to prevent the Freehold from being in abeyance. viz "in nubibus". -

2nd But again. - A man by creating an Estate at Com Law. to commence "in futuro" might forever avoid a real action. Since there is no Tenant "in capite". and at Com Law no action real could be brought against any but the Tenant in possession. and owner of the Freehold. -

Authorities Infra &c
2 Wilm 165
2 Wood 200
2 Bl Com 366

A Freehold Rent may be created to commence "in futuro". For here the above reason don't obtain. -

2 Vent 198 074
Palm 2930.
Salk 577

The meaning of the above Rule viz "that a Freehold cant be created to commence "in futuro" is that a Freehold must pass from the Grantor at the creation of the particular Estate. - and not the Freehold Remainder (as Blackstone would seem to mean) which don't pass till the Contingency happens (in case of a Contingent Remainder). it cant vest in the Grantee till the happening of the Contingency. - as Remainder to B & Heirs (now in law).

2 Bl Com 166.

1 Gow Eq

Vid. Livery of Seisin. 2 Wilson 166 2 B. Com 342-3.

The reason of the last mentioned Rule* is very long since ceased the rule itself has now entirely gone out of use in England and the mode of Conveyance by Lease and Release, and Bargain and Sale have altered entirely the necessity of Livery &c.

The second reason of the Rule above assigned for requiring Livery of Seisin has also ceased to operate.

Livery to the particular Tenant is construed to be Livery to the remainder-man. —

Dyer 18 & Cake 78 Rep. 151 2 B. Com 164

A Lease is not sufficient to support a Remainder Vested if it do not vest as not to be confined part of the Freehold — and Livery would determine the Estate at Will

And then must be a particular Estate in order to support a Remainder. if the particular Estate is void in its creation there can be no Remainder because in such case there really is no particular Estate.

2 B. 167 1 Inst 298 2 Roll. Ab. 418 1 Jones 68

Exception. a Devise made to one for Life who is not in esse remainder to B is good. B would take now if not as a remainder-man. this is abolished out of indulgence to last Wills &c.

2 Wood 179 at Hayden 414

If the particular Estate is good in

M.

in all cases but it is defeated before the Remainder can vest in interest the Remainder must fail. ——— Cro Eliz 205 - Yearm 209 2 H 4 - 4 H 4 - 261. 2 Bl Com 167 - Do 155 - 6 169. 2 Wood 180 - 6 - 7. 1 Jones + 573

This Rule is given by Blackstone in a different form and is not general — It is not in general applicable to vested Remainders — as if the Particular Tenant forfeits his Estate the remainderman takes the possession immediately — or if the Tenant surrenders his Estate — 1 Jones —

Where the Remainder is vested the rule is not generally used but it is in all cases of Contingent Remainders — Authorities supra

So an Estate to A for 20 years and after that to B in fee" now if the expiration of 5 years A forfeits his Estate B's Estate can never vest

Now this comes within my rule that the Remainder must pass out of the Grantor at the time of creating the particular Estate. — The meaning of this is that the absolute or contingent right of the remainderman must be created at that time. The rule as laid down by Blackstone is not correct. Parker 342-3 2 Bl Com 164 Litt 341 6 41. 2 Wood 174

Suppose an Estate to A for Life and remainder to B for Life on a Contingency or he returns from India — Now B has a Contingent right but not to the Remainderman if so it is a vested Remainder (or instrument Litt 49. 60 2 Bl Com 164 Litt 341 6 41 Plowd 25 2 Wood 174

That the interest don't pass to the Contingent remainder man is certain for it is now well settled that where a Remainder is limited on a future Contingency, the interest limited must remain in the Grantor, until the Contingency happens

Fearne 216 267-278-285-86. Cait Rud 263 2 Bl Com 167.

It follows from the above rule that a Remainder cant be limited on an Estate already "in esse" or created before hand — tho' the interest remaining may be granted but it is a Reversion not a Remainder —

If he should call it a remainder it is but a reversion "mutato nuntandi" —

Fearne 228 2 Bl Com 165.

Indeed it is a rule that a Remainder must be created by the same instrument by which the Particular Estate is created —

3d The third Gen. Rule is that every Remainder must wait during the Continuance of the Particular Estate for "eo instanti" in which it determines. By this is meant that it must vest in interest during the particular Estate that it may vest in possession "eo instanti" that it determines — Because the Particular Estate and Remainder being parts of one and the same Estate they must always subsist together, or in Contemplation of Law therefore they be disjoined the Remainder will not vest.

Fearne 233.

If I collate them so that if the Remainder does not vest during the continuance of the particular Estate and the remainder is supported thereby, one must commence when the other determines. Consequently they must be both "in esse", at the same time. 1 Coke 138 2 Bl Com 168. Raym 25 3 Coke 21.

For Fearne contemplating a vested interest "is- 2 Wood 179-80. 4 Edition Fearne 233. 237. 240.

A vested Estate is one of which the is a present fixed right of present or future enjoyment.

There are two kinds of Remainders viz: vested and Contingent

Vested Remainders are either in possession or in Interest.

By a vested Remainder however in the Court is always meant a Remainder vested in Interest. as where it vests in possession it is no longer a Remainder — being an Estate of which one has a right of present enjoyment. —

A Remainder vested in Interest is one of which there is a present fixed right of future enjoyment. i.e. in which a present interest passes to the Grantee but to take effect and be enjoyed in possession in future" Fearne 1. 3 Bl Com 165. 2 Wood 175.

Fearnes definition is this viz a vested Remainder is one which carries with it a present and fixed right of future enjoyment — Another Def.

A contingent Remainder is one by which no present interest passes to the Grantee but is to take effect on a dubious & uncertain event. — — —

Fearne 1-2.

I think Blackstones definition as to an uncertain period is unnecessary — — — —

"Mr Gould" on being asked whether this contingent interest was descendable said that a possibility coupled with an interest was (&c.) An Estate to "A for Life and remainder to his Son for Life and to B after his death" is a contingent Remainder as it is uncertain who will die first. A Remainder to a person unborn is contingent.

3 Coke 20.
Salk. 228
2 Show. 169
1 Bos & Pul 25
2 Wood. 182.
Fan. Dec. 250
Fearne 2-3-4.
Doug. 257.

By Com. Law a Contingent Remainder could not formerly be limited over to an Infant "in ventre sa mere" until the infant was born when the Particular Estate determined.

Fan. Dec. 320
2 Coke 51.
Bull. 225.
Moore 637.
Salk. 228.
Ret. Page 265.

But now by Stats 10 and 11 K. William 3d. this is done away and a posthumous Child is capable of taking a Rem. in the same manner as if it had been born in its Father's life-time.

Salk. 228.
2 Show. 169.
3 Bac. 124.
4 Mod. 282.
2 Coke 51.
2 Wood. 200.
3 Atk. 263.
3 Wilson 326.

It is the immediate Possession — See

This term "alone" to one not "in esse" must be to one who may be Common Possible "potentia propinqua" be "in esse" at or before the

or before the determination of the particular Estate

A Common possibility is distinguished from a remote possibility, vulgo spes prolis

A Limitation to the Heir or Child of a person [illegible] in esse is good — So an Estate for Life to A. with remainder to the Heir of B. is good even if B. die before A the remainder will vest in the person who is the Heir of B. —

6 Co. Rep. 26b 3 8
2 Bl. Com. 169
Feagre 145.
2 Coke 61 b.
1 Coke 66.
2 Bl. Com. 172
Christian's Notes.

But on the other hand a Remainder to the Heir of B. B being himself unborn at the time — or to the Heir of the eldest unborn son of B. is void in its creation — It is a remote possibility depending upon too many Contingencies

1 Burr. 35 6
D° — 184 ω
Hobart 33
2 Bl. Com. 170

So also a Remainder to a person unborn by a particular name — as if to John the unborn son of A is void in its creation as depending upon two Contingencies one depending on the other.

Feame 177
2 Coke 54.
2 Bl. Com. 170.

So a remainder limited on the happening of some unlawful event or the doing some unlawful act — is void in its creation because depending Blackstone and others The Law presumes such an event will not happen and considers it thereby a remote possibility — A better reason for the Rule is because it is a maxim of Law that no

Feame 178
Cro. Eliz. 509
2 Coke 51
Plowden 32
2 Bl. Com. 170.
Vol 1st page 278

I Gould

one

*Accurate any right

one shall be permitted to derive any advantage* from such an unlawful act. —

It is a Rule that a Contingent Remainder of a Freehold cant be limited on any Estate less than a Freehold because the Freehold must pass out of the Grantor at the creation of the Particular Estate else such Freehold Remainder is void.

1 Coke 130 Rep. 151 2 Wood. 199 3 Burr. 1771

2 Burr. 1771 1 Coke 66 135 Doane 241-8 52-54-58 272

We have also obtained that a Contingent Remainder may and must be defeated by the determination of the particular Estate before the Contingency happens on which the Remainder is to vest. Thus a Conveyance by Bargain and Sale Lease and Release will not support it

Rep. 151 2 Wood. 199

So a Contingent Remainder may be barred by a Fine and Recovery suffered by the Particular Tenant even though it be to the use of Trinity - because it determines the particular Estate

1 Coke 66 Cro Eliz. 630 Salk. 224 2 Wood. 186-7.

A vested Remainder is not thus barred

2 Wood. 186-7.

A mere defeasance of the Particular Tenant does not of course defeat the Contingent Remainder so long as he has the right of Possession he is seized in Law. —

1 Coke 66-7. 2 Wood. 196-9 1 Bellew 174 Sid. Ray 316

From the above rule that a Contingent Remainder may be defeated before the

2 Bac. Ab. 142 1 Roll. Ab. 378

Contingency

Contingency happens cause the necessity of
interposing Trustees to preserve Contingent
Remainders. This Jocular case during
the Contest between the Houses of York and
Lancaster in England &c

2 Rolle 799
Ch. Rep. 170
5 Coke 51.
Jeanne 847-8
gs. 1263. 1572-7.

The question whether a Remainder is
vested or Contingent does not depend on the
probability or improbability of the Contin-
gency happening, since it relates entirely to
upon the nature of the limitation. &c

2 Wood 181-2
Do 184-5-192
Hobart 30.
Salk. 232
Ld. Raym. 723
3 Rep. 488-9.

For example - "To A and the Heirs of his
body remainder to B in Tail" - This is a
vested Remainder yet it is highly probable
that it will never take effect. &c

The criterion is the uncertainty whether the
Remainder will ever vest in Interest. &c

2 Wood 192.

The following Rule is an universal Cri-
terion for determining whether a Remain-
der is vested or Contingent.

If the present capacity of the Remain-
der taking effect in possession is vacant
it is vested.

2 Wood 192.
Jeanne 149

But if the Remainder is not
possessed of the present capacity of taking
effect in possession it is Contingent &c

If an Estate is limited to two persons
with a remainder to one event to one

Cross
Rem.

and

4 Burr 332
2 Co 6 at 35
Dyer. 303.
Cowper 31.

and in a Will, except to the other three are called Cross Remainders

It is said in the Books that Cross Remainders can't happen when there are more than two Persons but this is incorrect. ——

Cowper 780
Do — 797.
1 Eq Ca Ab 224
2 Eq Ca Ab 364
Do — 416.

This is always a question of Construction and the rule of Construction is this viz. — When Cross Remainders are to be raised by implication between only two Persons the Presumption of Law is in favour of them, that it between more than two against them.

18 Ves. 416

It is said in the Books of Coke & that Cross Remainders can't be made by Deed — but that is not true. —

The true Rule is that Cross Remainders can't be raised by implication in a Deed but may in a Deed —

But when Cross Remainders are expressly limited they do not become annihilated Remainders then may be. —

St Conveyances 93 2nd page 1363

In Coin it would seem from the Construction of the Statute that a Freehold can be limited in a Deed as well as by Devise to commence "in future" — if in fee the Person in esse is the immediate Heir of one in Being — though it has been judicially so decided ——

Limit —

Executory Devises

This is a species of Executory and very much like a Contingent Remainder though differing in the mode of its creation.

Blackstone defines an Executory Devise to be a Devise of a future interest not to take effect on the death of the Testator but on some future contingency. 2 Blcom 172 1 Eq Cas Abr 186.

This includes a Contingent Remainder as well as an Executory Devise. So the definition is inaccurate. For though it gives the general nature it does not as Logicians say give the specific difference. Jeans 298. 2 Blcom 172 1 Eq Cas Abr 186

A better definition is. "An Executory Devise or Bequest is such a limitation of a future interest in Land by Devise as the Law admits in a Devise but not in Common Law Conveyances. Cowper 234

It follows that any limitations made in a Devise which would be good if made in a Deed, cant be an Executory Devise, but will assume as a Remainder. 2 Jones 388. Jeans 298 Do 302 2 Wood 232 3 Rep 84 Do 763 2 Vern 611 Carthew 310 Bays 725

So a Contingent Remainder may be created by a Devise and is good as such and yet it is not an Executory Devise

In making Wills men are supposed to be without the assistance of learned men. therefore great indulgence is shewn them as to their construction.

2 Bac. Abr. 179
Ruth. Dec. 200
Moore 299
2 Wms. 331

So a limitation in a Devise which would be void in a Deed may be good on account of the intendment to be a mans last Will and Testament.

This doctrine of Cy. pr. Devises was entirely unknown to the Comn. Law. —

It was not known in the time of Hen. 8th. when Devises were first allowed

Its origine was in the reign of Elizabeth and Cy. pr. Devises have been regularly built upon since that reign till they have become a Common subject.

35 Eliz. 935

It differs from a Remainder in these essential particulars 1st. In Executory Devises there must a Freehold be take effect in future" nor a particular Estate to support it. 2dly. It vests with a Remainder. —

2d. By way of Cy. pr. Devise a Fee simple or other less Estate can some contingency may be limited on or after a Fee simple. or rather a Fee simple may be subject to for a Fee after some contingency has happened or shall determine the prior vested Fee. 3d —

Poph. Ld. 233
Dyer 74
Palm. 132
2 Bac. 173. 398
Moore 303-4
Salk. 228
Cro. Eliz. 848
10 Mod. 420
Ruth. Dec. 238
Dr. — 231

3rd. That by a Remainder may be limited of a Chattel Interest, after a particular Estate for Life created in the same. — Authorities cited.

Such limitations as are mentioned above in Common Law Conveyances are void, (allowed only in Last Wills and Testaments). So a Freehold could not be given to commence "in futuro" and a Fee exhausted all the Interest a man had in the subject and again a Life Estate is gone from any Chattel. — Farmr 305- Fonb Dr 238 Dr 350 in 250.

A contingent limitation may be so made in a Devise that though in its creation a good Remainder yet it may on a certain event become an Ex.ry Devise. — Formerly alitery vide Willoughan Jackson 184- Jackson 401.

Thus if a contingent Limitation is made by Devise to depend on a preceding Freehold capable of supporting it as a Remainder and the preceding Freehold fails before the Testators death — as by the death of the Devisee the second limitation shall then vest and come as an Ex.ry Devise and yet it was a good Contingent Remainder in its Commencement. — Jacon 401- 1819-20. Jabott - 44 Dans 325 Dr 470-71.

And this is "ut res magis valeat quam pereat" To explain this rule in Executory Devises

1st. An Ex.ry Devise even of a Freehold need no particular Estate to support it. — — — —

A limitation by Devise of Land to A and his Heirs to commence on the day of his age or marr. is good.

Again a Devise in Fee to the Heir of A when he shall have one is good by way of Exec^y Devise yet none of these authorities could be cited in a Deed for it is a limitation of a Freehold to commence in future without a Particular Estate to support it and in the mean time till the Contingency happens the inheritance must descend to the Heir at Law of the Devisor the Heir holds the Estate without any entry but his inheritance is defeasible

2 Bl Com 173
Jeans 313 314
2 Powell 233
Fon^b Dec^s 254
D^o 356
2 Wood^r 333
1 Sch & Lef 565
Dan^s 481 pl 6

2dly A Fee or other Estate may be limited on a Contingency with a Fee & Estate and yet the first Estate dies before the Event happens to B and his Heirs that is good by way of Executory Devise In this Case the Law will not suffer the first Estate expired for a Fee without all the Interest that can be had in any thing — This is often a necessary Substitute for the first Fee on a Certain event.

Authorities infra.

This is not a Remainder for there a particular Estate is carved out of an Estate and that and the remainder constitute one Estate So this second Interest cannot be barred by a Fine or Common Recovery

1 Mod^r 129
3 Leon 116
10 Mod^r 420
3 Leon 103
D^o 116
2 Bl Com^s 173
D^o 368
3 Wood^r 184
Fon^b Dec^s 256

Indeed it is the same as that "I devise my Estate in Fee to A if he dies & dies without Heirs to B and his Heirs

3dly A Remainder may be limited of a Chattel interest after a particular Estate for Life created in the same. - (as) If having a Term for years devised to A for Life remainder to B. for years. - This is good in a Deed though it would not be in a Deed for a Common Law Conveyance giving a Life Estate (which is greater than a Term of years) amounts to a total disposition of the Estate.

8 Coke 95
2 Bl Com 174
2 Wood 338 9

And this may be limited to any number of persons successively for Life and yet the ultimate interest may be given over and may all take in succession, though all in the mind ones are dead when the last takes next to the first.

2 Bl Com 174

Here was formerly a distinction between a bequest of the use of a Chattel interest for Life, and when the use was given the subsequent limitation was holden to be void. But when the thing itself was given it was holden not to be good. But is now settled to be good in both Cases

2 Bl Com 398
Do — 174
Jeane 304
8 Coke 95
1 R Wms — 1
10 Coke 46

That far as to the distinction in the mode of creating Executory and Contingent Remainders rather than to the different nature of the Estates when created.

Jeane 310

There is also an essential difference in their nature viz. every Devise

(as)

and

cant be found by Fine or Recovery Descent
Vest with Contingent Remainder
One reason is that an Estate Devise is not
Vested interest Vests a Contingent
Remainder — But the principal reason
is that I does not do land upon any Trust
limitation or Contingency Estate for it. de-
vested to the Son in the meantime —
Will that if he dies a Infant & Heir dies
effect the Devise for his Estate is not devised
Law part of the Same Estate with Estate
the Son —

1 Bl Com 52
2 Bl Com 173
Keane 306
10 Coke 52
Litt Co 6 185
Dyer 74 358
2 Wood 227
Cokes 103
Keane 314

An Estate Devise cant be found by
a Recovery a bare Estate Vested with Estate
the Contingency or Estate the ultimate lim
Estate Devised must be Estate in order to
render the limitation good for otherwise
would end perpetuities

Keane 3145
2 Bl Com 174
12 Mod 280
Salk 229
2 Mod 230

An Estate Devise the limitation must
be so made that it may take effect within
Life or Lives in being and 21 years and a fraction
of a year afterward

100
Rep 506
Salk 228
2 Bl Com 174
Dany 560
Keane 314
320 56 7

So also you must vary the limita-
tion. That a Devise to Man for him and
upon the Condition & accordingly to the
intention dies of B when 21 years D.

Keane 200
314 20 55
Litt Illm 20
2 Bl Com 174

Proceeding to the limitation of the
Condition may by possibility happen at a
more remote period than is prescribed in the rule
the Devise is void.

Blackstone and others lay down this rule differently as to the remainder of a Chattle interest. Vid. that all the remainders must be in effect during the Life of the first Devisee and that the Contingency must take place during his Life. But this is not Law.

For this a Remainder to A for Life remainder to B for Life and remainder to the unborn Sons of A would be bad. for as to the unborn Sons of B. for the Contingency might not take place during the Life of A and of course the Sons might not take the ultimate interest. For the Rule vide 1 Fid 437. 2 Bl Com 174.

But it is now settled that the rules of Limitation are the same in all the three kinds of Executory Devises.

It follows as a Gen[l] Rule that when an Ex[y] Devise is limited to take effect after a Gen[l] failure of Issue it is too remote and void. for it may take effect at a time exceeding that in the rule.

You will remark that remoteness and Contingency of Event is immaterial in Contingent Remainders for there is no danger of a perpetuity, because it is alienable.

But remoteness of Event is the criterion in Ex[y] Devises. for otherwise there would be a perpetuity. Whence this distinction & Annotation to A and his Heirs and after &c.

vol 2 page 140

7 T Rep[ts] 102
Fearne 330
Do - 355-6
3 Atk[s] 382
2 Bl R[p] 421
2 Wood 330.

4 Burr & Pul 351-95
2 Burl 47 30
Fearne 315-324-41
Powell Dev[s] 426
Talbot 268
2 Burn 877
3 Coke 411
3 Atk[s] 615
4 Mod 316
Ld Ray[d] 37
2 Wood 332-3-41

Intestates
Estates

die without Issue to B and his Issue
This is not an Estate Tail by implication
but is a Fee after a Fee and is good —

Salk. 233
Jeane 301
D° — 170
3 Keb. 456
2 Keb. 276
Carth. 234
Pow. D. 426

But if the Land had been devised to A
without Issue of his Body to B. This is an Es-
tate Tail by implication and B may take
under this Devise as a Remainder-man
This is done by way of Executory Devise —

If there in case of such limitation
over and a failure of Issue of Body — as if given
to A and if he dies without Issue to B if such
Issue would (if such Issue are qualified and re-
strained by other words to be used in their
vulgar and usual meaning) at his death. A is a
good Ex. D. and because his Estate ceases
and if such is confined to a Life of a person
in being — But where it is not an Estate

Jeane 353
Salk. 225
1 Will. 207
R. Dec. 257
3 Keb. 144
2 Keb. 332
3 Salk. 282
2 Mod. 314
2 Mod. 376
1 Rep. Wms. 482
3 Rep. Wms. 258.

Tail by implication Courts will construe
it in any manner to take it out of that
technical construction — as if the devise should say
"if he dies without Issue then to B." Thus takes
it out of the Rule So if the devise having no
Issue at his death" — this is good as an Ex. D.
Devise. So also "leaving no Issue behind him" Lede

If one devises to A for Life and Remainder
to B in Fee provided that if A's Wife has a
Son born the Land shall go to him in Fee the

R. Dec. 251
2 Dyer 127.
Such Case in
Lord's Case
to 2 Ro. 84

Son has an executed defeasible Estate
and A has a particular Estate. — — —

In Conn. it has been decided by the Supreme Court of Errors that the words "to A and his heirs and if he die without issue" are to be construed according to their obvious acceptation and not according to their technical meaning a Limitation. Therefore may be good Fee, as in Executory Devises.

Mr Gould thinks it best to adhere to the English rules. For otherwise you must overturn much of the English Law. you can't give both constructions. that might in that case create a Remainder.

It is established that no Executory Devise shall take effect as such if it can operate, or take effect by way of Remainder

Any limitation of a future Estate as by way of Remainder tending to create a perpetuity is void whether in a Deed or Devise and that construction which we have adopted would allow of a perpetuity by means of Executory Devise of course to Remainder by Devise which would create a perpetuity is good. "& &" "A for life with remainder to his unborn Son" is good; but "to the unborn son of his unborn Son" is bad. for do the ultimate fee is always & always in abeyance.

So the rule is that positively established that no limitation can be carried out further than the unborn children of a person in esse"

Mr Gould Hopkinson. never should stand in the way to destroy Estates Tail by implication

Fearne 391
5 Bac Ab 592
1 P. Wms 332
2 Ves 1s 251
3 Burr 1632.

In some such case Courts construe words to carry into effect the general intent of Parties
2 Rep. 248 the Testator according to the doctrine of Equity
D° 254 Cases as near as may be (i e) will give an Estate tail to the first Devisee rather than it should fail

When a Contingent or other Estate is devised over on a Condition annexed to the preceding Estate and the preceding Estate must take effect the subsequent Estate takes it's place (i e) the remainder will be
Year 163 accelerated (E.G.) a Devise to A for years. Re-
D° 309 410
Dany 323 336 mainder to first eldest son of the Body of the
Hardw 322 Testator name and if not to C. man if he
Sid 417 428 refuses to take the name & take Estate first in
Salk 329 substituting one for the other provided by the
1 Eq Abk 361. terms of the limitation itself. This differs
1 Bos & Pul 350 from the case mentioned above, if the par-
2 Vern 722 ticular Estate determines during the life of the Testator

But the ultimate limitation can't take effect if the preceding limitation fail through the remoteness of the Contingency for the ultimate one takes effect as a substitute for the other. But the preceding one was a Contingency too remote and the succeeding the latter one is too remote. The preceding one is taken in it's creation (E.G.) A Devise to person not in being at the time of the Devise to A and if he dies without
2 Rep. 25 issue

Issue of his body to B. remainder on contingency to C. A devise as above can be taken? No. for the limitation to B was void for the penalty was personal and so the substitute cant precede the principal.

So if a subsequent limitation depends on a prior one and the prior one dont take effect the subsequent one cant. — Eg.

So if for life remainder to the unborn Son of B. A refuses to accept the Grant, or is incapable to take. Then the remainder fails whether contingent or vested there being no particular Estate to support it. — —

2 T.R. 362
1 Vern 134
Finch 117

2 T.R. 251
D° — 245
D° — 254

Some Gen.l Rules as to Expectances

Vested Remainders are descendable. devisable. transmissable to personal representatives and disposable before the Tenant in Tail comes into possession

Personal property is not descendable but transmissable — In this case the interest was Consent viz. a right to enjoy at a future period

2 Wood 287
D° — 212

Audley modern authorities. The same rule is settled as to Contingent Remainders and Executory Devises except that they are not disposable in Law though they can in Equity and that before the Contingency happens i.e. before the

before the interest vests. The latter are
possibilities clothed with an interest &.

1 Fo Rl 30
8 Vines 112.
1 Ves 46-7
2 Rl Abr 292
Fearne 286
Do — 439.
3 Rul 488-93
1 Bl Rep 332
Talbot 117
1 Pun Ca 222
4 Rep 248
1 Eq Ca 222-9
1 Bro Ca 434
Pau Dec 34
Do 234 497

Possibility & Legacy - Cant in Law an interest is necessary in order to an Assignment they are assignable in Equity! and the reason is that Equity construes an agreement executed either a Grant into a Covenant agreement which it must take effect as a Grant. This is to further the original intent & (interest) of the parties. So when the Contingency happens Equity will consider the interest to be transferred in consequence of the former agreement.

2 Wood 313
3 Atk 12. 49
7 Rul 635
1 Bro Ca 208 9
2 Wilson 24
Fearne 449.

This is now absolutely settled. formerly a distinction was taken between Executory Devises & Remainders but both are alike - there is none now.

A Contingent Remainder or Executory Devise cant be transferred by Deed at Law. for there is no present interest - and a Grant must be of present interest, except the rents &c in the Contingency and that cant be called an interest. — Indeed it is a maxim of Law that no man can convey any thing at Law by Deed except an actual and potential interest. but here is neither.

4 Rawle 432
2 Wood 184
Do — 312
1 Pau Dec 152
2 Bl Rep 1200
1 Ves 132
1 Fo Rl 54

But though such interest as an Executory Devise or Contingent Remainder can be conveyed by Deed yet they may be Extinguished

any

posted away being effected by Fine or Recovery by way of Estoppel. There is this difference however - In case of Ex^t Devise it cant be barred unless the party (i e the Contingent Devisee) if party himself to the Fine or Com^n Recovery. Whereas Remainder may be barred by Fine levied or Recovery suffered by the particular Tenant.

A Fine or Recovery is a bar to the party and all claiming under him. - - - -

The reason in the latter case is the Fine destroys the particular Estate and the remainder falls to the ground. - - - -

But in the former case the bar is only by way of estoppel. - - - - - - - -

An Executory Devise may be released at Law to the owner of the Land before the Contingency happens. - A release does not necessarily import a Conveyance of any interest at all. It is only a waiver or abandonment of all right and title a man may have - He may kindly never to make claim. -

An Agreement of an Ex^t Devise will be carried into effect in a Ct of Eq^y only. Equity construes it an executory agreement or Covenant to convey. - Eq^y does not give effect to the Grant as such, but merely as containing an agreement - They will

2 Wood^n 213
2 Wood^n 213
D° — 238
Ca. t. Jas 2-3
Jeans 310
D° — 313

2 Wood^n 213
1 Vern 411
11 Mod^n 152
1 Vern. 489
Jeans 460
13 Wm 608
9 Mod^n 107

2 Wood^n 213
1 Vern 409 & 503
12 Ch 11 — 608
9 Mod^n 107
Jeans 350

They will consider the party to make the Conveyance when the contingency happens. —

But the assignment must be for a valuable consideration or for a consideration in the second degree, not confined to purely voluntary

2 Vern 608
1 Ves jun 409

Dougs 323-6
Talbot 44-
Fearne 401
Ca. 419 20
Dougs 476 note

Event happening after the execution of the Deed and before the consummation of it by the death of the Testator may vary the limitation from a Remainder to an Executory Devise

Where the event happens after the death of the Testator it runs a double contingency so that a limitation on one event that has not happened would have been a Remainder may in another which does not take place be construed an Executory Devise

Dougs 470 b
2 Vern 349

The limitation in such case is called a Limitation upon a double contingency — or upon a Contingency with a double aspect —

2 Vern 686
Dougs 470 b
2 Ves jun 354

And this may be exemplified — for here if the limitation as an Ex. Devise is provided for by the terms of the limitation.

The first limitation is an Executory Devise that the last follow will manifestly be so and it is laid down in the Books as a Gen. Rule that when the first vests in possession those that follow vest in interest and tho' the

This requires qualification for the Rule does not apply to Remainder. though it does to Executory Devises. for the 2d remainder may be Contingent and the subsequent one vested —

This last rule Cant extend to Cases where the subsequent Limitation depend on events which have not happened when the first vests in possession — Suppose thus It is limited to A then one to B. when he arrives at 21 years of age." — Here the first part of the Limitation is void because if a Son is born the Possession vests in A. and the subsequent to B cannot in event

Suppose to the eldest unborn Son of A" or his Heirs A Chattel vested. —

Suppose the Limitation further "To the eldest unborn Son of B when 21 years of age" — now As is Contingent i.e. before B.s Son is 21 years old. and As interest vests in possession. But B cant vest in interest. —

Never does the Rule apply unless when the event has happened before the first vests in possession during the Continuance of the Particular Estate. —

Dany 478
Salmo 306
Do — 386
2 Vesey 249

Thus much of Executory Devises. —

B.4.4.

Estates in Reversion

An Estate in Reversion is the residue of an Estate left in the Grantor to commence in possession after the determination of some particular Estate granted by him. — 2 Bl Com 175. 6 Co Litt 233 b. 2 Wood 172.

The Reversion remains in the Grantor by the act of the Law without any reservation &c. all. for what he does not transfer remains in him of course. — 2 Bl Com 175. 3 Levinz 406. 2 Wood 172.

A Remainder is always created by Contract. Conveyance or in some way by the act of the parties, by means of the rules of Common Assurance. — But a Reversion is only created by the act of the Law

There may at Com. Law be a Contingent Reversion. I know however but of one instance. A conveys to B and his Heirs a Lease on qualified &c. while they continue Tenants of the Manor of Dale. So it may be an Estate in Fee. and it may not be an Estate in Fee. — 2 Bl Com 109

The residuary interest is Contingent till the event happens — afterwards it vested —

Such Contingent reversion cant be conveyed by Deed. for there is no present interest — They may however be conveyed by Will & surrender.

Indeed there can be no attornment in this case. —

As a Reversion is created by Law only it follows that if a man grant an Estate for years - life &c with remainder to himself in fee this void. for what he thus limits to himself as a Remainder is a Reversion. The old Estate never passed out of him. It is retained as for a Tenant to cut off himself. ——

2 Bl Com 176
2 Wood 173
Cut Eliz 321.
3 Levinz 406

On the other hand if one should grant an Estate to A for Life reserving rent with reversion to B and his heirs - this is not a Reversion but takes effect as a Remainder. —

2 Bl Com 176

because it is created by the act of the parties. not merely an inference of the use of the word "reversion"

When Rent is reserved on a Lease it is incident to the Reversion - so that by a Gr. grant of the Reversion the rent will pass. —

Co Litt 143
2 Bl 1745.6

& yet conveys the Reversion to B. now the rent is due to B.

But rent is not inseparably incident to the reversion for there may be a special Reservation to the contrary. and by it the rent may be granted without the Reversion and the Reversion without the rent.

2 Bl Com 176
1 Inst 151 2

eg the rent may be granted for 10 years and after that it is due to the Grantor. ——

But though the rent will follow the

reversion

the general Grant of the Reversion yet it is not held "a conveyance" (i.e.) by a general Grant of the Rent the Reversion will not pass. 2 Bl Com 278 D° 288-90. 176 2 Wood " 173-4 Co Litt° 15.2.

The incident follows the principal and not the principal the incident ——— "accessorium non ducit sed sequitur suum principale." —

It is a rule of Com Law that a Lessor cant convey the Reversion till the Lessee enter. — This arises from the necessity of Attornment for the Lord could not alienate his Seigniory without the consent of his Tenant and "true vassal". - and this is called attornment

This doctrine of attornment by the 4 and 5 of Anne. and 11 Geo 2nd. has ceased. So I think the Rule does not obtain now in England. — In the United States this doctrine is unknown and so I suppose no necessity for it here. - It arose from feudal principles

Co Litt 143 Litt 551 567 Co Litt 46. 2 Bl Com 72 D° 288. 290 Perkins 161. cram. and other Authorities

A Reversion may be granted by any words sufficient to the intent intended to be conveyed or passed. If a conveyance of one Lands is made the reversion passes as if he had no other interest. ———

10 Coke 107 Plowden 138. 2 Wood " 174

Reversion is the most proper word. ——— Even before the Stat of Frauds a Freehold vested Reversion could not pass but by Deed and attornment. or by Fine and Recovery for

no-

Parker dec 36 2 Wood 174 Sillsbu 365-7 Co Ch 143.

for no Estate of Freehold can be made of the Estate in Reversion. But a vested Reversion for years might be forfeited without Deed. Fine must be done. Enquire by Office. Stat. of Frauds. — There may be a Reversion of a Chattel interest.

2 Wood 174-5.

A Reversion may be conveyed in Law so it may be subjected and then conveyed.

A Particular Estate may be granted out of it and still there may be a reversionary interest in the Grantor. (A)

(B) (C) a Reversion pour autre vie is not to be for 10 years from and after the limitation to B cestui que vie to commence from the execution of the declaring Particular Estate

2 Wood 174-5. 3 Levinz 154-5.

There may be a Reversion of a Chattel real e.g. a Lease for 21 years Leases for 20 years.

The Reversioner is intent on the determination of a Fee Tail. It does not appear that the Law for an early Fine does regard it as good value therefor.

Another reason is that the Estate can always be tacked and usually will be to the Reversion is in the Person of the Tenant in Tail. So for the purpose of a Fine the Fine can never be subjected on the covenants of this section on the ground of Recovery as Tenant by descent, provided he has nothing but the vested remainder. —

Paul. Mj 443 3 Ke W 235

Finis.

Doctrine of Merger.

It is a General Rule that if a greater and less Estate in the same subject meet in the same Person, without any intervening Estate, the less is merged or lost in the greater.

This rule proceeds on the ground that the union of the two interests is a virtual surrender of the particular Estate to the Reversioner — If the Law did not merge the less Estate he could not surrender to himself. — 2 Bl Com 178. Cro Eliz 302. 3 Leon 437.

But to produce this effect these two Estates must be in one and the same right and in one and the same person. — 1 Rep 418. 2 Bl Com 177. Cro Jas 275. Litt 338.

But if an Estate Tail and a Reversion in Fee should meet in the same Person and be in the same right there would be no merger. for no actual surrender could be made by the Tenant in Tail. — 2 Bl Com 177. 2 Coke 61. 8 Coke 74. Cro Eliz 302.

The Law defeats this Estate, except by a Fine, and Common Recovery.

Fraudulent Conveyances &c.

James Gould Esq. February 1812.

The subject now which we are now to enter is highly important as questions often arise in practice under this Title. . . . .

By the English Statute 13th of Elizabeth and by a similar one of our own, all Conveyances, Gifts, Suits, Judgments Executions or Contracts, made to defraud the Creditors of the Grantor, or Party, attempting to be bound thereby are void, as against such Creditors of the Grantor or Obligor, their heirs, assigns, &c. &c. against the persons attempted to be defrauded.

St. Conv. 354-5. 2 Bac. Abr. Title Fraud. Roberts on Fraudulent Conveyances 2. 3. Note.

Not only Deeds, Mortgages &c. of Lands but every kind of Contracts as Judgments, Executions intended to operate on personal property are void as against the persons attempted to be defrauded.

N.B. "Roberts work on Fraudulent Conveyances, says Mr. Gould, seems to be in general a correct & normal treatise, but much execrable in point of style and manner, and needs a translator as much as if it were written in Hebrew."

In the English Statute a provision is expressly made, to save from harm a "bona fide, Grantee or Purchaser, who was not privy to the fraud. —

To bring the case within the Stat. so as to render the Conveyance void as against Creditors &c both parties must be privy &c or consent to the fraud.

In treating this title I shall use the phrase "fraudulent Conveyance" as expressive of all I mean, as a convenient substitute for all the circumlocution of the Statute.

Another English Statute viz 27th of Elizabeth makes a provision for the security of "bona fide" Purchasers similar to that of the 13th of Elizabeth for Creditors.

2 Bac. Ab. title Fraud. C. Robert 17-8th

And it makes no difference whether the Creditors and Purchasers were such before or after the fraudulent Conveyance.

Vol 3rd 41 * Contra as to 27th Eliz. in Vol 2nd 366

It is now well settled that both these Statutes are in affirmance of the Com. Law* and that all the objects aimed at by these Statutes might have been obtained by a liberal and rational Construction of the Com. Law.

Cowp. 434. 3 T. Rep. 546. 2 Atkins 357. Cro Eliz. 444. 3 Coke. 83. 1 Inst 290 a. b.

The case was formerly held and to be otherwise. But it being now deemed Common and as Statute Law the Courts will follow where ever the authority of the English Com. Law is acknowledged.

Vol 3rd 11 supra.

As between the parties both being privy to the fraud the fraudulent Conveyance is good or valid. So if only one party be privy

Roberts 33 Do. 614. 1 Bach 124

to

be fraud he is bound though the other is not. 1 Roots 489.

A subsequent purchaser for a valuable consideration will hold against any former fraudulent Grant &c. even though such purchaser had notice of the former fraud. - for such former Grant being fraudulent was not valid against the future "bona fide" purchaser, and such are not bound to regard it even if they are informed of it at the time of their purchase. 5 Coke 60. Frazier 711. 2 Bac Ab 148. 9 Car 55. 2 Bac Ab 148-9 & Vol 2. 367-8

The propriety of that rule seems to have been questioned by eminent authorities, as see - 1 New Rep 335. 1 Ves Jun 271 4 Cruise 375 9 Car 71

The rule is the same as to both prior and subsequent Creditors. though originally it was supposed that none but prior Creditors could avoid the fraudulent Conveyance - Stiles 446. 1 Bac Ab 90. 1 Atk 914 2 Atk 600. Talbot, 64

Agreeable to this rule I have uniformly seen the decisions in Court. - as was the Case of Beech & Catland. in Ch of Errors of 1810. Sale -

The most usual instances of fraudulent Conveyances are those which are voluntary or without a Consideration though not always. - 2 Vern 19. 3 Atk 520. 2 Atk 481 5 Coke 81 for. Stat. Eliz. Cap. Magna Carta on this subject

For though a Conveyance may be for a valuable and even for an adequate Consideration yet if it be for the purpose of defrauding Creditors, it is void - and here the way to take advantage of such fraudulent Grant is to levy on the property as the Grantors. and if the fraudulent Vendee take with hold under his Execution. -

In some Cases arising under these Statutes the fraud is actual, and in others only Constructive.

To make a Conveyance fraudulent it is not necessary that there should be an actual intent to defraud. It may be fraudulent Constructively where it was well intended by the parties. if such Construction becomes necessary to prevent fraud in Consequence of the Statute. ——

Robert 35.

So in Case of actual fraud. It is not necessary that the Cred Mort or Purchasers, were actually deceived by it if so it were made with intent to do fraud and had that effect

This intent to defraud may be inferred from circumstances &c as if a voluntary Conveyance be made to A and afterwards one for valuable Consideration to B these facts are enough of themselves to set the whole aside as a Fraud. ——

5 Coke 60a
1 Ro Ab 334
Cowper 280.
Ambler 288.
4 Ennis 374.

It will from these facts be presumed that fraud was originally intended. ——

And such a subsequent effect has Fraud in the Law that even if the subsequent Conveyance for valuable Consideration be defeated by the non performance of some Condition. Mortgage failed of the second day will restore, or set up the first, for having been once Void it can never be revived. ——

2 Rolle 35
Robert 328.

It was formerly supposed that if a Conveyance was made with a view only to defraud one, &

1 Coke 93b
10 Coke 56
Dyer 162

The

of his Creditors. It was not said with regard to the rest. But it is now well settled that if found to be intended against any one Creditor the Conveyance is void as to all of them and any of them may set it aside - as fraud on the whole to defraud the whole of them.

Palmer 415.
Robertt 467.

I shall hereafter speak of the various badges of fraud. One however I will here mention. Vizt The Grantor being involved in debt at the time of the Conveyance furnishes a strong presumption of fraud i.e. fraudulent intent.

Robertt 453-9.
Cowper 711.

This presumption arises under the 13th and not 27th of Elizabeth

Robertt 61. 395.
D° 13. 15. 18. 66.
1 Fonbl. 208-9
Cowper 434
D° — 705
2 Vern. 444
1 Levinz 150. 193
D° — 337
2 Levinz 105
1 Mod. 119

for according to many weighty and irrefutable authorities want of a valuable Consideration was formerly held to be only presumptive evidence of fraud under 27th Elizabeth and was prima facie fraudulent.

But it has lately been solemnly decided in the case of Doe & Manning that a voluntary Conveyance is "per se" fraudulent under 27th Elizabeth i.e. as to subsequent purchasors for valuable Consideration.

2 Cas. 56.
Pas 64 — 13
3 Burr. 1603
3 Vern. 250
2 Bl. Rep. 1019
Robertt 194
D° — 201
Contra
Holt 4th — 404.

This we are now to regard as Law and this makes an important alteration, for if the circumstance of a Conveyance being voluntary afforded only a presumption of fraud that presumption might be rebutted — but if such

Con-

Conveyance is "per se" fraudulent It is "presumptio juris de jure" and cannot be rebutted.

This decision (Doe vs Manning 9 East 59.) related only to "purchasers" for valuable Consideration and was made only with reference to or in conformity with 27 Eliz. c. though many Lawyers have fallen into the mistake of thinking that a Voluntary Conveyance is to be regarded as fraudulent "per se". Both as to Creditors and Purchasers. This is erroneous

12 Mod 268
Robell 190
1 Atk 472.
2 Vern 327
3 Ves 10.

No case, I believe contains even a "dictum" that will warrant this opinion and many authorities are direct and stand unimpeached and must be regarded as settled Law that as to Creditors that Decision makes no difference in the old Opinion.

If it be asked why a difference is made in favour of Purchasers, bona fide, above Creditors? the answer is that this Conformable to the General estimation of the Law the Equity of a Purchaser for valuable Consideration and "bona fide" of any particular piece of property is deemed of a higher nature than that of a General "bona fide" Creditor, who has no such Special Claim on any Specific piece of property This Case is perfectly analogous to that of a Pledgee (as a Mortgagee) to become a particular Debt. The Creditor whose right

8 Ves 529
4 Bro 388
Do 393 398
Robell 704
Do 18 32
1 Atk 94

right is thus secured by a special lien on some particular piece of property has a prior claim on that piece of property to any general Creditor whose security is only personal and who has not taken care to secure himself by any specific pledge &c. i.e. the Creditors trust to the personal responsibility of the Debtor. but the purchaser advances his money on his property

Kelly 234
3 Bac 643
1 P Wms 491
Salk 449.
2 Vern 554

Lecture 2nd.

Voluntary Conveyances or those without a valuable Consideration are deemed and regarded as "per se" fraudulent against purchasers for valuable Consideration. —

Marriage is always in Contemplation of Law a valuable Consideration. — A Conveyance therefore in Consideration of Marriage is never deemed fraudulent and can never be set aside on the ground of its being voluntary. — as it is never deemed to be so.

Robertt 103
Dº 105. 200
Sugden 1134
2 Bl Com 297
4 Cruise 24
Dº 388.393

A Conveyance in Consideration of Marriage or a Marriage Settlement is entitled to the Consideration of the Statute 27 Elizabeth against any prior fraudulent Conveyance —

Robertt 105
Dº — 133.
Harden 398
4 Cruise 383

Thus if A voluntarily conveys to B and afterwards in Consideration of Marriage settles the same Land on C wife of B it is the execution of B.

There is one important distinction between a Marriage and pecuniary or other valuable

or valuable Consideration. &c." If a Grant be made to A B & C. &c in Consideration of a pecuniary Consideration from A only & all the Grantees hold in a valid manner and are protected by the Consideration from A. &c.

(Robert 109
Do 110. 113
1 Rolle 781
Moore 504
7 Coke 39.b
9 Mod. 232
10. Mod. 334
Cas. Jur. 711
2 Eq. Cas. 105.
2 P. Wms. 175.

But in Case of a Settlement in Consideration of Marriage any provision for Collaterals relatives. Has no advantage from the Marriage & any remainders to such Collaterals are void. as to all "bona fide" purchasers and Creditors of the Grantor. They are good only as to the object of the Marriage (viz the Wife) or her Heirs. but not to Collateral Claimants.

The reason of this distinction I take to be that when a Grant is made to several for a valuable Consideration from one of them all are supposed to have their parts but in Case of a Marriage Settlement this is not so.

(Cas. Jur. 711.
2 P. Wms. 5 9
2 Eq. Cas. 145.
Robert 113
Do. 123.

Lord Mansfield once said (a mere "obiter dictum") that such limitations to Collaterals is good against Creditors but this opinion was not expected on a solemn decision. and it may perhaps will be doubted.

(7 Coke 39.b
Robert 109
Do 110. 113.

Yet in such Cases of remainders to Collaterals in Consideration of Marriage they are good as between the parties.

Though Marriage is a valuable Consideration tho an important Consideration is better

whether the Settlement was made before it in Contemplation of Marriage or after the Marriage ——

If a Settlement is made by a Man upon or after Marriage not in Pursuance of any previous Agreement nor on any meritorious Consideration, it is void as to Creditors and Purchasers — as it is not in Consideration of Marriage (i e) is not the procuring Cause — Cowp. 287. 2 Bl. 684. 1148.

But such Settlements if the Grantor was not involved in Debt at the time have been usually supported against subsequent Cred. — 2 Vern. 10. 2 Atk. 520. Fitzg. 226. Rob. 18. B. 2. 187. 191. 228. 2 Bl. 684. 1148. 9 Cait. 5 a. 2 Levinz 146. Cro Jac. 158. Cowp. 378. 3 Bro. Ch. 617.

But when such Conveyance is void as against subsequent bona fide Purchasers for valuable Consideration, and in favour of them will be set aside.

This is another instance of the greater degree of favour shewn Purchasers under 27th of Eliz. than Creditors under 13th of Elizabeth — for reasons see the end of the former Lecture — 4 Ves. 23. 4. 3 Bac. 643. 1 Peere Wms 491. Salk. 449. 2 Vernon 387.

But a Settlement made after Marriage in Pursuance of an Agreement made before for that Purpose is not regarded as voluntary, and will be supported against Creditors and Purchasers — and the reason is that the promise or Agreement first made was in Consideration of Marriage, and the after Solemnization of Marriage (and therefore a good Consideration

17 Ves. 35. 4. 2 Vern. 103. 1 Eq. Ca. Ab. 357. 2 Freem. 260. 3 Peere Wms. 6.

And the subsequent Grant is only in pursuance or fulfilment of the prior Agreement which was the governing Cause of the Marriage

(But if in the last Case the subsequent Grant or Settlement varies materially either as to the Subject matter or the quantity of interest from the prior agreement it will not be by and in Consideration of Marriage Because it is not in execution of the agreement &c —

Amblr 288. Ves^r 285 2 Eq. Ca. 120. Robell 245 D^o — 247.

If the Grant be divisible it will be supported so far as it conforms to the prior agreement and voluntary and void as to what is beyond that as if Before marriage a Settlement is made on Blackacre and after the Marriage the Settler settles Whiteacre also the Settlement is void as to Whiteacre but good as to Blackacre

The same holds in Case where a Grant is afterwards made of a greater estate than was agreed to be made as where a Grant in fee is made where only an Estate for Life was agreed to be settled on the Wife — — — —

Cas. Ca. 45. 57. 2 Vern. 304. Robell 220 D^o — 228.

This rule as to the subsequent fulfilment of a prior agreement is carried so far as to render valid a subsequent Settlement made in pursuance of a prior agreement by parol only

How the rule of nearest Consanguinity is used

al —

as such under the Statute of Frauds yet it is good as a Consideration and it was a Consideration for the Marriage and must as such be entitled with

If an agreement by a Husband to settle or convey in favour of his Wife is executory it is void as to Voluntary Purchasers and Mortgagees without notice. but not as to general Creditors and Voluntary Grantees.— 2 Vern 309. 1 Eq Abm 322. Dal 66. 69. Rob 227-8. 230-1. 241-2.

The reason is that the interference of Eq is always discretionary, and the Purchasers and Mortgagees either without notice of the Wifes prior equitable Claim, they have equal Equity and the legal Title of which should will always prevail. but with regard to general Creditors and Volunteers Eq deems the Equity of the Wife to be greater and therefore will enforce the agreement against them.

But if the pre agreement in favour of the Wife is executed she will exclude even Purchasers and Mortgagees for then they have equal Equity and the legal title therefore shall prevail.

A Settlement made after Marriage without any prior agreement and without any other consideration than a depending Child or otherwise providing for a family is good against subsequent Creditors of the Grantor (provided he was not in debt at the time of making the Grant) but not against Purchasers for valuable Consideration Eq Ca 1824-5. 187. 191. 227 pl. 2 Vern 10 2 Atk 530.

Now

When an application is made to Ct. to Compell
Ambl. 328. a conveyance in pursuance of an Agreement or Grant made
1 P. Wms 622. after marriage it will not extend further
Rob.t 232 Ca.t than to defeat even a Purchaser for valuable Consideration who had notice of the Agreement at the time of becoming interested.
So stands the rule but I don't clearly see the reason of it. L.d Roberts says it proceeds "because a Purchaser is not presumed to know the rules of Equity as he is those of Law" This to me does not appear any reasonable. I don't see why ignorance of the rules of Equity ought to be presumed in his favour or why they should not rather expose him if he was really ignorant of them. For notwithstanding that he knew that a meritorious Consideration existed and he had no good right to intrude himself, when thus acquainted with the fact.

But where the articles made after Marriage in pursuance of an Agreement made before require no correction the Party
Rob.t 233 claiming under them for valuable Consideration (i.e. the Wife) may have them enforced against a Purchaser with notice for tho' the Purchaser with notice of a prior title should
D.o - 234 have no defect.

On the other hand if one for a valuable Consideration articles to purchase
Rob.t 234 the actual Equitable title of a person volunta-
16 Ves 428 ry

settlement on a Wife this agreement will never be enforced in her favour to the prejudice of the Wife for having notice of it she shall be but no equity and not having the Ley of Title he has no claim to the aid of any Courts of Law or Equity. 5 Coke 60. 2 Br. Ch. 148. 9 Coth. 59.

Lecture 3rd

Observed that a Marriage settlement made after and not in pursuance of any agreement prior to the Marriage is deemed voluntary and therefore void against Purchasers and Creditors

But a recital in a Settlement made after Marriage of an agreement made before marriage to make such settlement, accompanied with any Circumstances in corroboration will be deemed good evidence of such prior agreement - but not without some corroborating Circumstances. Pre Ch. 101 2 Vern 304 1 Atk. 188. 2 Vern 190

A Settlement made after Marriage but upon meritorious and valuable Consideration is not deemed to be voluntary though it be in pursuance of no precedent agreement - as if a Husband makes a settlement "de novo" on his Wife in consideration of certain Jewels of hers being settled on him or in his favour that is on valuable Consideration and good - 2 Atk. 417. Pre Ch. 452 Do - 425. 1 Atk. 16. 183 Pre Ch. 413 2 Eccles 76 Do - 440.

So if a settlement be made by the Husband and the Wife during Coverture on Consideration

2 Vern 18 Bridgeman 21

Cro. Car. 158. Consideration of a portion given to the Husband with the Wife by her friends it is
Salk. 154 deemed to be for valuable Consideration and
1 Mod. 16. 138. valid both against subsequent Purchasers
and Creditors of the Husband

It is no ground of objection to a Settlement in the said Case that the Stipula-
1 Vern. 304. tion to pay him the Wife's portion is not
actually complied with. The stipulation
itself is a valuable Consideration.

This is the doctrine of the Court respecting all
lawful and reasonable promises. —

And even if the Husband is obliged to
2 Atk. 220 apply to Equity to enforce the payment of
16. Vin. Abr. 383. pl. 3 his Wife's portion and is required by the
3 P. Wms. 305. Court the Condition on which she shall have a
Rob. Dig. 278 decree for her Wife's portion) to make a
279. 288. Settlement on his Wife. such Settlement
is deemed to be on valuable Consideration
and therefore good against Purchasers & Creditors
for the decree for her portion is the Consider-
tion in this Case and this Settlement the only Con-
dition on which he is to obtain it.

The Court of Chy. took notice of this Case of both sides of the Case and compelled Equity to be done between
Parties &c.

If a Trustee in whose hands the
Bac. Abr. Tit. Trust. D. Wife's Property is refused to deliver up such Property
Authorities. 121 unless the Husband enters into reasonable Settle-
ments

Settlement from her. Such Settlements is good i.e. not voluntary (and because the Trustee had an authority to execute such a Conveyance upon Record, but because the Husband in this Case does no more than Equity would have Compelled him to have done — The Rule is the same as if he had actually done it, in obedience to a decree of Chy.

1 Atk.s 190.

But if the Trustee voluntarily and without any Consideration resigns up the Trust premises to the Husband, and afterwards the Husband makes a Settlement on his Wife such Settlements is deemed voluntary (for it was not made in Consideration of any thing moving to him at the very time of making it) and void as to bona fide Purchasers.

2 Atk.s 67
Dr. 430
Pue 6 Ly 414
4 Vesy jr 18
2 P. Wms 639
3 Dr. 11
1 Vesy 539

Whether such Settlement be void against Creditors, also depends upon the question whether the Husband was involved in Debt, at the time of making the Settlement.

If the Settlement required of the Trustee in the above Case is unreasonable and far exceeding in amount what a Court of Equity would have ordered him to settle on his Wife. It would be deemed good so far as reasonable and void as to the excess in favour of Creditors.

2 Vesy 18
Rob. 1 285
Dr. 395-9
1 P. Wms 540
3 Atk. jr 566

What would be deemed reasonable depends upon the Circumstances of the Case — on the fortune & circumstances of the parties.

In general

In general it is a rule that a Settlement equal value amounts of the Wifes fortune will not be deemed unreasonable.

Stap. 339. Dewey 18 Dick. 1130 Rac. Ch. 548 3 P. Wms. 11

Upon a Equation in which hand there is a Legacy for the Wife refuses to deliver out unless the Husband will make a reasonable Settlement on her such Settlement will not be deemed voluntary. This Case is similar to that of a Gentle before mentioned for in both Cases the Husband must do Equity to obtain the Property that withheld and Equity will Command him to make the reasonable Settlement demanded.

New. 2. 18 1 Ch. Ca. 306 2 Vern. 240 Robert. 339

If the Wife had only an equitable interest in Chattels real a Settlement made by the Husband in Consideration of it will be deemed voluntary because the Husband has an absolute right to it without making any Settlement. The reason of this distinction they do not know (says Mr Gould). It seems to be rather an anomaly but it is settled. It was indeed first decided in the House of Lords against the opinion of the Lord Chancellor and Lord Holt whose opinion it was always grumbled at in Westminster Hall but tho' the Chancellor has not ventured to disregard it

Rules and distinctions are distinctions made in contempt of Clearness &c

When a disposition of property is made in Contemplation of Marriage and without the privity of the other party it is in a manner deemed a fraud on the other party and void or voidable as such

First of such secret disposition by the Wife:

* If a Feme Sole before Marriage by Deed executed in Contemplation of her Marriage with the Knowledge of the Husband conveys her Estate to Trustees for her own Use and afterwards marries the Husband is entitled to the Estate against the Trustees

2 B. C. 345.
1 Ves. jr. 22
2 Ves. jr. 194.

But if such Disposition be made by a Woman Secretly pending a Treaty of Marriage or without the Knowledge of the Party she afterwards marries such Disposition will be set aside as a Fraud upon the Husband

2 B. C. 345
2 C. C. 41
2 Vez. 17
2 Bac. 292
1 Ves. jr. 56

The Law will not tolerate such a Practice nor give any encouragement to such Policy by supporting them

And even even in the former Case

there

Where the Disposition is made without reference to any particular marriage of the Husband shall be affected by a subsequent marriage and suitable Settlement upon the Wife, her Disposition will be set aside in her favour provided she had no notice of such disposition by the Wife. For the disposition in the Settlement is made by him in expectation of the enjoyment of her Portion & in consideration of the Legal marital rights of the Husband over the Wife's property & the injunctions on the Lady of deception and Concealment to defraud the Husband therefore

2 Ca. Ch. 533. Rebell 250. Dº 357.

A Widow in Contemplation of a second Marriage made a Settlement for the Support of her Children by the former Marriage such Settlement will be valid against the second Husband though he had no notice of it,

Dan. Ab. 250. 2 Ca. Ch. 357. 1 Vern. 408. 1 Atk. 265. 2 Bacon 202. Gardner. 765.

The reason of that difference from the Gen. Rule, is the imperious obligation a Parent is under to provide for their Children — The Law in this case deems it a Trust that a Woman before she puts herself and her whole Fortune into the power of another should take Care of her former Children. —

A Settlement by a Woman under such Circumstances has always been deemed valid not only against the Husband but likewise against Subsequent Creditors and bona fide Purchasers. — But as Gardner Case I think the

Case

the case is otherwise since the decision in the case of Downs Manning see page 357 — Robert 360 — Dc — 365

The rule is the same even if the second Husband has made a settlement on his Wife without notice of her disposition in favour of her Child ren. — But not actual fraud was intentionally practised by her to draw from Lord such settlement in expectation of her fortune for actual intentional fraud will always defeat the effect intended. — (Robert 358 g — 2 Ch Rep 533. — 2 Vern 350 — Robert 354 — Dc — 356 — Dc — 360

If a Woman on the eve of a Contemplated Marriage makes a voluntary Conveyance of her property to a Stranger, it will be deemed void and will not bind the Husband — But in this case I presume the rule Contemplates the Conveyance being Concealed from the Husband for if he knew it & take it he would be considered as agreeing in it — 1 Bro Ch Rep 259 at — 2 Vern 264

On the other hand the Wife has been in several Cases relieved against Clandestine Conveyances by the Husband and deeds agreements between the Husband and Wife present with a view to defraud and that the Wife will be set aside on account of such imposition & fraud — 3 P Wms 65 — 4 Dc — 74 at — Eq Ca Ab 131. — Robert 350

But here it should be observed that Ch will not relieve the Wife so readily as them do the Husband — for the Wife is not considered in Law as the proprietor of the Husbands fortune

as

not be in Force. So in case the Wife should die before the Husband, the Wife's Estate must have been actually transferred on Trust. Her expectations must have been created. She must have been induced to marry by the belief that her Husband is a man of property, & in which case where her expectations will be disappointed unless such acts are relieved against this Court will generally afford relief &c. —

There are in the Books some very ancient Cases of this sort & as in one Case a young man made an offer to part for a sum of money with the young Lady to whom he was about to be married previous to his Father's Consent promising to pay him 10,000£. This the Court care to throw out as intended Wife as by that means procured the written for marriage. But at the time of making the Bond he gave one security to the intended promising that it should never be put in force &c But the Court after the Marriage had taken place declared the Bond for 10,000£ properly given to be void and compelled the payment of it but the one given security to be void. and accounts of the fraud practised on the Wife.

So in all Cases of secret Conveyances &c intended to defeat after the marriage is obtained & part of the System for the express purpose of deceiving the Wife or her friends to induce the marriage to draw from them a pre Estate in way of portion the Courts may be expected to relieve the party injured &c

Lecture 6th

Cannot be enquired who can take advantage of this Statute to prevent fraudulent Conveyances who can invoke the Stat. in aid of the latter right and first of 27th of Elizabeth

And here the Gen. Rule is that no other than a "bona fide" purchaser for a valuable Consideration. or some person Claiming in the right of such purchaser can avoid a prior voluntary Conveyance. A mere voluntary Grantee can't hold against a prior voluntary Grantee of the same subject. The title of the latter is no better than that of the first named "potior est jure possidentis"

3 Coke 81. Cowp. 706 D° — 712 Talbot 64 3 Wilson 356. Cro Eliz 445. 1 Burr 396 Roberts 369 D° 372. 382 D° — 425-6.

It is to be remembered that Marriage is a valuable Consideration and one of the things which this Statute is meant to protect, and in and against which the Stat. may be called in.

4 Bruce 383. Hardres 398. Rob. 103-5. D° 123. 367

If a voluntary Conveyance be made to A. and subsequently one to B. in Consideration of Marriage B. may avoid the Conveyance to A.

It is a rule that a purchaser under a family Settlement in Consideration of natural affection can't take the benefit of the Statute.

3 Coke 83b Rob. 370. D° 64.

The Son or other child in whose favour the Settlement is made merely in Consideration of natural affection or any person claiming under such Grantee can't avail against a prior Grantee "bona fide" for valuable Consideration

nor

nor can defend his Claim against a subsequent bona fide Purchaser for valuable Consideration.

The same rule holds as to a Jointure made to the Wife during Coverture the Husband Commits in this Case take advantage of a prior voluntary Conveyance by the Husband for she is deemed in no better Situation than one who (in the above Case) claims under the grand Signior

Bro. Ch. 445

And it is said a Trustee to whom a bona fide Conveyance has been made for the Payment of the Husband's Debts, Could set aside a prior voluntary Conveyance. There has indeed been a Case decided But Lord Hardwicke would not in many Cases, even where he takes the Purchase to be a valuable Consideration and the Property is bought to be for such Consideration where it is intended to discharge Incumbrances,

Ambler 394
1 P. Wms 338 note
2 P. Wms 376
1 Atk. 603
3 Atk. 32
2 Eq. Ca. Ab. 48

Finch 104
2 Vern. 371

But where it is taken to be a valuable Consideration that is fraud in any Collateral Case will be granted in a bona fide Purchaser required, with intent to defraud any one added to inadequacy of Price. As will invalidate the Grant also to take away the Estate from it. But the Consideration must always be valuable but bona fide

Fonb. Eq. 165
Ca. Ab. 13
Robert 371

If there be such an inadequacy of price amounting only to a Colourable pretence Coop. 713
as it is of itself sufficient presumption of D.o 714
fraud and will set aside the purchasers of the 2 Vern. 618.
benefit of the Statute. and this not because Rob. 373.
the inadequacy is great (which will not per se invalidate the Grant) but because the presumption of fraud is necessary & unavoidable

Where there is no Collusion to the second Co. Eliz. 445
Conveyance if the purchaser for an in- 8 Coke 83.
adequate Consideration has overreached and cheated the Grantor he cannot take advantage of the Statute to set aside the prior voluntary Conveyance — E.G. where a man of weak understanding and hardly able to take care of his property made a voluntary Grant of it to some of his relations who were more capable of taking care of it for his benefit — and afterwards that man sold to a speculator bought of the silly Grantor the same property for a trifling Sum. the Grantee could not take advantage of the Statute.

It has been held that a Mortgagee Amb. 389
though not within the letter is within the Skinner 223
words of the Statute 27th of Elizabeth — but Holt. 477.
this distinction is to be observed between a Mort- 2 Vern. 342
gagee and a purchaser. that as the claim of the Cowp. 41
Mortgagee in Equity is only for the purpose of Security of a Debt a prior voluntary Grant,

is

is void as against a subsequent Mortgagee
1 Ch Ca 55 only to the extent of the Debt due to the
Roberts 373 Mortgagee & secured by the Mortgage (i.e. if
it is to be only "pro tanto." The Jewish voluntary
Creditor will hold the Equity of Redemption
now and on paying the Mortgagees debt will
hold the Land. But this is contrary to the
Principles of Mortgages and a distinction found
in Equity.

Roberts 373 But it seems a Purchaser not pri-
1 Ch Ca 217 vately decided that a Fraudulent Conveyance obtained
by the Mortgagee will not afterwards be given
in favour of such voluntary Grantee Lord

2 Rolls Rep 305 3 Lev 96 Dyer 205. 2 Rolls Ab 783 Sutton 84 Roberts 374 3 Lev 96 If a Lessee for years Husband & Co-
venant is made for his indemnification
is a Purchaser within the Statute 27 Eliz

This however Roberts observes is very
questionable I should think no reason to
mention in case of Security being by way
of Mortgage, for that is certainly meritorious
& conscientious and certainly it would
seem to be a valuable Consideration of the
Grantor obtained a Mortgage Debt — The contrary
however by Roberts is asserted

3 Gould Eq 3 Gould thinks that an absolute Conveyance
made only for the purpose of security and
intended to be used on a certain Contingency
& not only one in favour of which the Plaintiff can take
advantage against which the Plaintiff could
make use of.

If it is but a secret trust between the parties which always ineated at the Conveyance (as being voluntary) as it is just stated Sheppard Version Or if it is not a secret trust it is usually an unconscionable advantage taken by the Grantee and therefore bad — that when the business is honestly and openly done by way of Mortgage I see no objection to it.

A Case was lately decided in this County, viz Brace vs Gatland which will illustrate my idea. A Person involved in debt and distressed both Brace and Gatland made an absolute Conveyance to Gatlin of Property worth 8 or 900 Dollars in a private manner for a Debt due to Gatlin of near little more than 100 Dollars Brace attached the Land after being given in Gatlins hands and sued it against Gatlin. for there was an absolute Conveyance for the more purpose of securing Gatlins debt and a secret trust between the parties that Gatland should reconvey by Gatlin on payment of the Debt. or else the design was to defraud the Creditors or Gatl. or finally it was an unconscionable advantage taken by Gatlin. of the necessities and fears of his debtor. at any rate it was bad against bona fide Creditors.

Lecture 5.

To constitute a Purchaser under the 27th of Elizabeth the Purchaser must of the same Rob 375 identical thing which was the subject of the

1 Inst 3.b- the prior voluntary Conveyance. Wherein the
Such subsequent Purchaser can take advantage of the Statute. Co. A was a Lessee for
60 years but he forged a Lease for 60 and sold
this to another person and this case was decided
not to be within the Compass of the Statute
because it was not a Grant of the same
Real Property.

Robt 1376 A valuable Consideration
is paid it is immaterial what is the Sub-
ject of the Purchase (or rather the property paid
in consideration) whether a new actual Gain
gained interest or the mere extinguishment
of an interest which the Purchaser owned
either is a valuable Consideration.

2 Roll.r 337 A Lease for 1 year for valuable Consider-
Co Jac.s 181 ation is a Purchase under 27.th Elizabeth
2 Bac Abr.t 1019 and Payment of Rent is a valuable Consideration

It is said that to render a Conveyance good
1 Roll.r 45 within the Statute the second Convey-
Rob 1376 ance must be made by the same person who
(3).r 387 made the first But this rule seems to be
now exploded so as to create a Tenancy in the
same Case where the Grantor in the first
instance was a Stranger to the Estate whether
this alters the case of making such new
Grant to be seen

1 Cook 72 But if the subsequent Grant be at the Sale
Robt 377 within which was before granted and known the
Cr.r 385.

and Vice versa the Estate. It is fraudulent though the power making the Second be different from the one making the first — Privity of Estate is enough to attend the business.

If A. makes a voluntary & fraudulent Conveyance to B. and then another to C. who sells to D for a valuable Consideration. D cannot avoid the first voluntary Conveyance to B — Moore 833. Rob^ts 383-4

It is settled in Equity that a Trustee under a voluntary Settlement Contracts himself a subsequent purchaser in his own favour so as to have the benefit of the Statute. for he does not act "bona fide" he betrays his trust and therefore gains no rights. 13 Vin. Abr. 527. 3 P. Wms 332 Rob^ts 389.

If a Trustee by direction of the Cestuy que trust makes a voluntary Conveyance to a third person. he cannot afterward without the direction of the Cestuy que trust defeat it by a subsequent Conveyance for valuable Consideration. — Ld Hardwicke Lord in Trust for B and makes by his direction a voluntary Conveyance of it to A. afterwards he transfers & sells to a third person for valuable Consideration without notice and without the direction of the Cestuy que trust. this Grantee cannot avail the prior Grantee though a volunteer for this subsequent Grantee can have no more than the Grantor had to Grant and his remedy only of the Grantor — Nay 105 Rob^ts 391

Nov 105
Robt 391

But a Person who makes a purchase in his own name with the money and for the use of another is a purchaser within the Act

Bac 3 Abr 252
Vern Ch 2 Ca
Vol Cond 2 D

A person who purchases an Equity of Redemption out of the Land may be a purchaser within the Statute as well as if he bought the Land itself.

Cro Chas 551
Hyed 173
Robt 392
Do 462

And in Gen all Incumbrances "bona fide" and for valuable Consideration are purchases within the Statute

These Statutes apply as well to personal as to Real Property. - But the application of them in the two Cases is somewhat different

Robt 323-4
1 Day 258

That if a fraudulent Conveyance of Money or other personal Chattels be made and the same be lost or otherwise consumed before the same Creditor of the Donor can obtain his Execution, it is forever lost - For the Creditor has no other remedy than to take the thing itself by Exon -

We readily see that such a loss or destruction can not happen with respect to real Property which can neither be destroyed nor run away with. —

1 Day 258

In Cases the Creditor has greatly the advantage over Creditors under the English Law since he may have an attachment or mesne process &c but then cannot in England do

There is however both here and in England a method of redress by suing on the penalty of the Statute How it may be observed both the Statutes viz 13 and 27th Elizabeth in such a penalty. Besides rendering the fraudulent Conveyance void as against third persons a penalty may be recovered if the case relate to personal property to the whole amount of the thing given and if real to one years value of the Land &c. This difference in the amount of the penalty, in the two cases is owing in the case of personal property the penalty is often all the remedy that can be had. but it is not so in Land (as appears above)

St Com. 355. Rob. 13 & 27 Eliz.

It seems to be Roberts opinion that Money is not within the Statutes but I cannot see how it should not be when it can be identified (as well as any other personal property) It is true Money may almost or quite always be both Concealed by the Grantee or other Donee so that a subsequent bona fide Claimant can get hold of it. but this is an objection going only to the difficulty of proof and affords no substantial reason why the Statute should not apply as well to a sum of Money voluntarily given them it can be identified as to a Horse or any other piece of personal property

Roberts 4 Edit. 2 Vern. 490. 1 Eq Cases Ab. 349.

J Powell Esq.

Lecture 6th

When a Good has been given by a man to anyone as a reparation or Consideration for owing any by Seduction already effected. it is good as between the parties but considered in Equity so far voluntary as to be void against his Creditors and set aside. but if assigned it is considered a right purchase as between the parties that the man should make the best satisfaction the thing admits of.

2 Wilson 339
2 Peere Wms 362
Do — 339
Salk 153
2 Eq Cas Abt 186
Do — 288.

Such Gift would be altogether bad if given on the promise of future Marriage as the Consideration would be unlawful

So on the same principles a Court of Equity will detain a Conveyance for such a Consideration in favour of Creditors and Purchasers for value

A Conveyance to Trustees for the Payment of Debts of the Grantor where the Creditors are not made parties is voluntary and void as to such of the Creditors as don't assent to such Conveyance (see Howes debts No B. Case D. had conveyed his property to E in trust for them & to pay them. yet this is said to be void as to all the Creditors who don't assent and are not parties to the Deed. — However much doubt the correctness of this Decision is regarded. it seems to go on the ground that the Trustee is a Stranger to the persons who are not parties to the Deed. — But I believe the

Robinson 429
Do — 437
2 Vern 510
1 Bro Ch 194

1 Bro Ch 1

the presumption is always good till rebutted that such a settlement is made to the person entitled in favour of others. When in that favour it is made absolute to it. For it is presumed to be favourable to them.

And that matter is still more doubtful the correctness of the principles of the above rule is this. Which is well settled viz. that if one of the Creditors is made a party to the Deed it is good as to the whole of them and on good consideration.

3 Cohe 81
5th Rep. 420
Strong case
Dy. 330.
3 Day 6 340.
2 Johnson 226.
5 D° 413
Conn. Rep. in 1811
Naylor vs Hunt-
ington.

It has also been determined Law that a Conveyance to Trustees for the payment of Debts due in a neighbouring State. by the Laws of which an assignment is good & made in a good when the question arises — or in other words that if an action is brought in this State shew the subject matter arose in another the Lex Loci shew the transaction was transacted

3 Dallas 370
2 Mass. Rep. 89
1 Bos & Pul 138.
1 H Bl. 665.
1 N York Rep. 402
3 Cranch 73.
5 East. 124
Laws 508, 7, 80

It seems to be settled and I doubt not that it is on very correct principles that such a Conveyance for the payment of Debts as is said above is valid though the Debts are barred by the Statute of Limitations. For the Statute of Limitations does not extinguish the Debt but only takes away the remedy — The spirit and reason of the Law in that case favours the revival of a Claim that barred and will make any subsequent acknowledgement sufficient to revive the Debt and remedy &c.

Cowp. 548.
5 Burr 2630
2 Burr 1099.
2 Ld Ray 389.
D° 420. 1101
Rob. 432-3
3 Rep. 454
2 H Bl. 340
Laws 58

If the Creditors not included in the Trust being a bill in Eq^y to compel the Trustee to pay them debts: the Conveyance as to them is void "ab initio" though originally made without their consent & participation &c ——

Rob^y 434
3 P. W^ms 222

Donations to Charitable uses are void if the Donor was in debt at the time of making them (i.e. as to future "bona fide" Creditors - & not if not in debt they are not void as to subsequent Creditors or Purchasers for value upon Consideration with notice)

1 P. W^ms 265
D^o — 421
D^o — 675
1 Vern^r 230.
Rob^y 438
D^o — 439.

Their rule however may be affected somewhat and doubtless is by Stat^e 43^d of Elizabeth. ——
The Law very much favours such Donations and the idea of fraud may be said to be excluded in the case. It is hardly supposable that a man who is benevolent enough to make such a Charitable Donation would wish to cheat his honest Creditors or if fraud was his motive that he would wish to have the name of cheating them

Ex. 2^s, 3^e, 1

There is a kind of Gift, partaking of the testamentary nature of a Legacy, and a "donatio inter vivos" called a "Donatio Causa mortis." A Man makes a Donation in that it is not to take effect until the death of the Donor and a "donatio inter vivos" - in that it must be during the life of the parties - In every Donation this Donation is void as against the Creditors. If the Donor any man must be just before he is generous &c

Roper on Legacies. D
D^o W^ms 406.
Rob^y 442 to 4
Ves^r 777.
Bunb^y 111.

It has been decided in Equity that if a Defendant in an action of Covenant in Court of Common Pleas pending the suit with a View fraudulently to defeat the Effect of his Contract provided it be for valuable Consideration is good as against the Effect — but not if it be merely by voluntary Gift —

Reg. Lib. B 1749. Fol. 450 Do" 458.

A voluntary Settlement made between the Date and Execution of a Covenant giving a right to damages only Cant be set aside by the Covenantor unless there appear actual fraud. So if a man Covenant to build a House and fail of doing it to pay so much by way of damages and after Conveys to a voluntary Grantee all his Property the Covenantee if any Estate of the Covenantor shall fail and he recover damages Cant set aside the prior Grant and the Reason given in the Books is that at the time of making the voluntary Grant no debt in damages had accrued the Covenantee had then no Cause. — Therefore would be different if the Covenantor had engaged to pay a Sum of Money at a future time or when he had given a Bond or Promissory Note then it would be "debitum in presenti solvendum in futuro" —

Fane. Lib. 1737. Fol. 460-1

If a man procures a Conveyance to be made to another (as the Father to his Son) and then the Creditors non the payment of the Father Can set the Conveyance aside provided it was

Do. Vin. 479 2 Vern. 490 Pasch. Cooths. 550 Vinor. Title. Fraud. Q. 2. Vol 2d. 377

was a Pet made in Equity for the Father — and therein was explained, because the Father had no right in Law and of Course his Ch. Love no Claim &c

And in one Case the same decision was had where a Grant was made to a minor Daughter and the Father actually enjoyed all the Profits of the Land during her minority. he was held to be entitled to do Equity in the ground of being her Guardian

1 P. Wms. 111.
D°. 608.
2 Eq. Ca. Ab. 415.
Rob. 1. 468 Sth

But if the Land is in the hands after the Daughter arrived at full age it is probable it would be held to be subject to Survivorship and Testamentary Gifts &c

Rob. 1. 607. 8

The General Rule is that Property in his hands in Equity for another &c. that Court never draws over it in another Right and the matter & Conveyance of it's Power unless it is in debt. Still Creditors can't set aside the Conveyance for the Property is none of his and his Creditors could not have had a Lien of the Property if he had not conveyed it

Co. Elbo 291
Rob. 1. 467

But if one conveys to his own use or to such as he shall appoint or directs that is deemed a Fraud on Creditors, or a Consequently void. as to such Uses because he has given Power of the Beneficial Interest - In the Language of the Law the Property is changed and become notionally his. — N.B. - The two last Cases suppose a Conveyance made by the Husband of Property which he holds in right of his Wife

2 Vern. 287
Rob. 1. 470 1.

Sed

upon the same principle where one has a General power over Property to appoint and makes a voluntary Conveyance or appointment it is void against the Creditors and may be set aside in Equity for he had it in his power and ought to have paid his Debts first & both in Conscience & Law because he had only a power of appointment which is only an equitable right

2 Vern 10
Pre Ch 52
D° — 232
2 Vern 319
D° — 465
1 Atk 465
3 Atk 269
D° — 650
Robin 472
D° — 477

If he had only a Special power of appointment i.e. to convey to specified persons as to A B and C a Conveyance made and to his authority is valid. It must be voluntary for since he had no power to assist in the payment of his own Debts — he —

Robin 475-6

I have repeatedly observed that a voluntary Conveyance* is fraudulent and void under both the Statutes i.e. both as to Creditors and Purchasers — I would now remark that a voluntary Bond while it will only in Contract, not yet presumed or considered void in Equity against both Creditors and Purchasers — It is set aside in a Court of Equity because before any action is brought or judgment recovered it is easily possible to give the thing before a Court of Law during the life of the Obligor in such a manner that Creditors can object to it

Lecture 7th
* i.e. as per deed to purchasers and may be made part thereof in manuscript as at page 357 & 361

Pre Ch 14
D° — 370
1 Atk 293
Robin 478
Vol 2nd 378-9

It may be disputed in Law after the death of the Obligor by Creditors of the demand.
Robts 479
Dº 480
It may be objected to us not being entitled to the rank of a bond debt.

The circumstance of a bond containing in the profession of the Obligor is a strong badge of fraud. for why is it be for a valuable Consideration is it not to be found so to the Granted?
Pue 6b 370
2 Eq Cas Ab 256
1 Atk 625
18 Wms 77

A voluntary bond is generally good against a Volunteer. as Legatees &c and it not to be disputed must enable to pay Debts &c
1 Atk 625
Robts 483 6
Dº 643

Even where a bond has been delivered to be cancelled. it has been enforced in Equity against voluntary Grants.
1 Vern 427
18 Eq Cas Ab 87
Robts 486 7

If a bond which is voluntary have a judgment Confessed on it such judgment is void at law and fraudulent &c. for judgments are one of the things expressly mentioned in the Stat.
Pue 6b 17
2 Vern 202

The rule of Evidence where a judgment is claimed to be fraudulent is that if a judgment obtained by Confession is claimed to be fraudulent the "onus probandi" lies on the Plff to shew it was a just Debt &c. but if a judgment has really been recovered the onus probandi is on him who endeavours to set it aside.
Holt 327

Debt a preference of one Creditor to another does not of itself make a judgment fraudulent provided the Creditor preferred be not of a lower degree — A somewhat different rule has obtained in England under their bankrupt Laws. but with this we have little to do, &c,

3 Bac. Abr. 298
Robt 492
1 Burr 470
Do 477
Cowp 629
1 B. C. L. 160.
5 T. R. 235
Do 420
3 Day 340
2 Johns 226

A Conveyance void in its Creation may become good in favour of a "bona fide" purchaser by, matter "ex post facto." As where a fraudulent Conveyance to A who conveys to B. a subsequent bona fide purchaser

1 Nels 332
3 Lewin 38
1 Sid Thin 133
Holt 477
Comb 222
Do 349
1 Bac 96
Sugden 736
Vol 2nd 386

said A conveys to C voluntarily — now B will hold as good to the exclusion of C. this subsequent Conveyance to C is held to enure that to B good

Virtue whereas to the same in favour Creditors under the 13th of Elizabeth. both which Cases are said to come within the general exceptions of the Statute. though if strictly the same would have obtained without the exception

1 Sugden 437
2 Vesey 190
Robt 497

We have no such proviso in our Conn. Statute therefore it is settled and has constantly been decided by our Supreme Court of Errors &c. Judges against there that a bona fide purchaser for a valuable consideration of a fraudulent Grantee. cannot hold against the Creditors of the first fraudulent Grantor

Preston vs Crowfoot. Supr Court of Errors 1811. Vol 2nd 381

A made a fraudulent Conveyance to B who sold the Land to C a bona fide purchaser for val-

valuable consideration. The Supreme Court decided that As Creditors could take and hold the Lands against C. ...

This I do believe to be incorrect. I know no analogy of the Law to this decision. It is a very important decision and in my opinion clearly a most mischievous doctrine to attempt to set up. This decision obtained because we had no exception in favour of "bona fide" Purchasers. But that in my opinion makes no difference. ...

Fl. Gault Esq.

Holt's Rep. 477
Com. Dig. 249

And as 27 Elizabeth a valuable Consideration shall ever be accounted wholly obliterate the fraud intended the Conveyance and not to be disturbed. It makes no difference whether the first Conveyance was voluntary or not as soon as a real "bona fide" valuable Consideration is given for a Conveyance the defect is cured &c.

Robert 497
Do. — 498

In some cases of allowing a settlement a continuing valuable consideration "et post facto" has been sufficient to support a voluntary Conveyance. (c.f.) A had Lands on a voluntary Conveyance. Died he long enjoyed and then married and settled those Lands on his Wife. Chancellor considered this settlement as good. But and the former cases on this Page depend on the important principle that a Bargain & Sale

1 Saunders 133
3 Ves. Jun. 278
Do. — 377.
Com. Dig. 706
Robert. 503
Do. to — 515.

to

apparently good and authentic evidence of title without notice to the contrary and giving a bona fide valuable consideration. shall be protected.

On the other hand a conveyance once good can never become fraudulent by any matter ex post facto. — Shepherd 63 Croft 445 Bulst 222

It is a very important rule founded in the soundest principles that a fraudulent Grant can never be legitimated in favour of the fraudulent Grantee himself by any lapse of time or length of possession. the Statutes of Limitations shall never run against Actual possession. but the creditor of the grantor may take it from him at any time. it is my singular task this rule. that is laid down in all the books. has never had a single case in England which came directly under it. there are no judicial decisions directly in point. — Beach & Cattland. Gallock 63 1 Vent 352 Robert 521. Domat on Civil Law.

The Statutes 13 & 27 of Elizabeth are like all others on this subject to be construed literally for the purpose of suppressing the fraud. — but here a distinction is to be observed. when the Statute speaks to set aside the fraud. it is on the subject matter of the contract a liberal construction is to be given the Statute to prevent the fraud. but when it speaks as a penal Law to inflict a penalty it is to be construed strictly. i.e. not to bring the case within the Statute if it is not within the letter of it. — 1 Roll Com 88. Robert 452 3 Coke 82 Plowden 59 D° — 78 1 Coke 131 1 Vent 257.

Lecture 8th

I have been thus far considering what Conveyances are fraudulent under the Stat. 13 and 27th of Elizabeth. and who may take the advantage of them —

There are certain badges of fraud which we are now to consider. i.e. certain circumstances which when found accompanying a Conveyance raise a presumption that it is fraudulent. the most common of which are the following. Viz." —

1st As a Conveyance being General of all the Grantors Effects affords strong ground to suspect the transaction to be fraudulent

2d The Grantor remaining in possession of the property after the Conveyance is another badge

3d Secrecy in the transaction is a badge of fraud. though perhaps the greatest of frauds for honest Conveyances are not unfrequently made privately.

4th A Conveyance being made pending a Suit affords just ground to suspect the motive

5th Circumstances denoting an apparent Trust between the parties is as strong a badge of fraud this is extremely important and wherever such circumstances appear the transaction should be well canvassed.

6th The insertion of unusual clauses in the Deed. as that the transaction is honest &c, is another very suspicious circumstance. - A man whose intentions are really honest would seldom think it necessary or proper to declare that he is not attempting to cheat any man. If there is a very singular Clause of this kind in Twines case. in 3 Coke 81.

7th The Deed being made in the absence of the Grantee is another badge of fraud. it affords a presumption that the design to defraud somebody.

8th The Grantors remaining in possession of the Land. or Deed of Conveyance is in many cases a very strong badge of fraud.

9th The Grantors being much involved in debt affords a presumption against the transaction especially if the Conveyance be made to a Creditor. or a relation.

10th A Clause of revocation in favour of the Grantor - "as that he shall have an opportunity to redeem under such and such circumstances" is always a strong badge of fraud. it affords a presumption of its being only a sham Conveyance. intended to defraud.

These are some of the most usual badges of fraud. but by no means a compleat list. they are as various as the ingenuity of men can make them.

3 Coke 81
Moore 638
Cro. El. 546
&c. 585

The others are in general important only as they tend to prove the first. Case of fraud above mentioned. I say generally for there are exceptions to this general remark — In some Cases there are Circumstances constituting fraud in themselves without any indication of a fraudulent trust — Indeed the fraudulent trust itself is "in se" a fraud — The Conveyance in such Case is not what it purports to be, it is a mere sham for the purpose of deception ——

1 William 44
3 Rep. 82.
Dyer 68. 286.
1 Vern. 245
2 Ch. Ca. 450
Rob. 1. 572. 600.
D° 548. 571.

I would observe that almost the strongest indication of fraud is the circumstance of the Grantor retaining the possession or enjoyment — If a man bonâ fide make a fair Conveyance of his land with the Grant of the possession — and if merely retaining possession by the Grantor, furnished a strong presumption of fraud, acts of ownership would be the presumption of title more violent — If a man possessed of realty belonging to another, man there must be some good reason shewn for it — The presumption is that it is in his own.

Authorities cited

Finch Case in 3 Coke 81. Rob. 1. 577-9 617-19. 548-58.

Here observe that the grounds of these last mentioned Cases, retaining possession, and exercising acts of ownership is that such retention, and use by the Grantor is inconsistent with the idea of a clear and fair Conveyance It is a dark and equivocal possession and the question always arises why, that the Grantor takes and possesses

Authorities cited

I would here remark that the Grantor retaining Land in his possession after he has granted it is not to be a badge of fraud as if the property was merely personal. for Land cannot be annihilated &c. and so enjoyed very suddenly and there seems little danger in letting the Grantor retain it.

But possession by the Grantor of the title Deed is a much stronger badge of fraud than retaining the Land itself. because they are the evidence of ownership. hence this is one of the most unequivocal badges of fraud that can perhaps be invented. in case of real property — Robt 531-5.

And here let me remark that the Grantor's remaining that in possession is never "prima" facie of itself a fraud. that is only a badge furnishing a presumption of fraud. — The distinction must always be kept in mind. for it is all important between a mere badge or indication of fraud. and an act which the Law deems fraud "prima" — the former may always be explained away if there is no actual fraud. the presumption may be rebutted. — but the latter cannot be contradicted. it is "presumptio juris et de jure" — and not to be rebutted. Robt 535.

The possession of Goods by the Vendor Edwards Haldwin. — Vol 3d — 415.
has been denied in Eng. to be "prima" fraudulent

2 Rep[s] 587
Do — 545
2 Bulst 225
Doctor & Student 23
3 Coke — 81 a
Cowper 432
2 Bulst 258.
1 Willes 44
2 Bac Abr 82
Rolls 563
Do — 571

fraudulent — but this is very questionable and I believe and supported by authority — ,

I have no doubt that the framers of either of the Statutes (13 Eliz. c. 5 & 27 Eliz. c. 4) contemplated as fraudulent per se — the mere retaining of property in the hands of the Vendor, or even that found by the acts of ownership — it is only an indication of fraud and this merely a matter of fact to be proved.

3 Bulst 21
Doctor & Student 23

The Statute 21st of James ch. 19 enacts that "Land" shall be included in the above mentioned provision. Confounded the Statutes — A later decision in England disregards that — ——

2 Vol 3rd 241
2 Do — 68-9

It is difficult to determine what the Law on this subject is in Penn[a]. our Courts have ruled all around the Compass, and their decisions have been very discordant. I shall however agree to the current of decisions that I

I observe that I have suggested the question to be also a Conveyance purporting to be absolute, which is essential — It may be that a Conveyance is only Conditional, and it should be observed that where a Conveyance is merely Conditional the possession of the Grantee continued

unimpeached

furnishes very little if any presumption of fraud and when the Grant is not absolute unless certain conditions have been complied with or the other side. It does not furnish even the slightest presumption. indeed till the Condition be performed. It can't be said that there is really any Conveyance - - - - as a Mortgage.

Cro Ja. 445. Shepherd 65.

I would observe here that you are not to be puzzled when you meet the case that under 21 H. James 1st. on the subject of Bankruptcy. a Mortgage of personal property is fraudulent — Mr that is a different subject from what we are now considering — Vide Bailments —

1 Atk. 160. 2 Vern 348. Ex parte Dey 555. Selw. N.P. 220. Vol 3rd 41-2.

In case an actual immediate delivery is impossible or any inconvenient the handdelivery could not be any little or no presumption of fraud and in such case a mere Symbolical delivery is sufficient as when a real one is inconvenient — as the delivery of the key of a Warehouse &c.

1 Atk. 165. 2 Ves. 462. 3 Ves. 71 1 Vern 354 Pl. 361-6. 1 Bunn 478. 1 Bro C.C. 125.

A Grant by a man much in debt is presumed to be fraudulent. at least it is extremely suspicious — and if made "pendente lite" is still more suspicious. whether the Case be in Law or Equity. — It is not material as to this kind of the subject whether the suit pending be of a legal or equitable nature.

1 Cowp 47. Dyer 295a 1 Rolle 549. 1 Vern 459. Robt 573 Do — 578.

Lecture 6th

I was yesterday reading of the Statute of frauds. — Not purchase that subject to

Robt 579 note, H.

some purchases for a valuable Consideration with notice that the Grantor is indebted by Bond or otherwise such notice does not affect the rights of the purchaser even in Equity. Now altho' there is no particular lien on any piece of property a man is not prohibited buying, because the owner is in debt. ——

3 Coke 82 1 Rolle 34 Skinner 327 Finch Mich. 5th Eliz. Grand Ch.

Under the Stat. 13th of Elizabeth if a man Conveys his Land with intent to Commit Treason or other Felony which worthies Forfeiture to the King it will generally be presumed that the Conveyance was intended to defraud the Crown &c.

Our Conveyancing Statute does not contain the word "Forfeiture" It is most improbable therefore that a different Consequence might be given to it &c.

We are next to consider in what manner advantage may be taken of these Statutes.

Cro Eliz 233 Dyer 265 Robt 501 Do. 506-8 3 Coke 80 Dyer 295

And here I would observe in general terms that the Party defrauded (as the Creditor &c) is entitled to consider the Conveyance as never having been made. and to treat the property as remaining in the possession of the Grantor, for which the Conveyance was made directly against the

the prohibition of the Statute & clearly
Courts equity in Law as valid ——

A fraudulent Conveyance is considered
in Law as no Conveyance at all as against
those intended to be defrauded — and is to be
treated in the pleadings.

A mortgage is fraudulent & Conveyance to B to
defeat his Creditors — Now if C a Creditor of A
levies an Extn on the Land. B cannot plead
with effect the Conveyance to himself. If the
Sheriff C may traverse the fact of a Convey-
ance and if found to be fraudulent the issue
will be for C. for as before observed that is no
valid Sale as against a Creditor. . . . . .

So in the common case of a Bill of Sale
made to defraud Creditors the Execution
is levied on the property in the hands of the
Grantee

A man having made a fraudu-
lent Sale of Goods & Chattels & is indebted,
the Creditors may levy on the property in the
hands of the Grantee although never Removed.

In Comm. the property of a deceased Per-
son is never thus taken in Extn to pay debts
that is sold by the Executor or Administrator
by order of the Court of Probate. &c. ——

In England if one dies after having
made a fraudulent Conveyance of his

property

Hobart 79
Cro Eliz 533
5 Coke 60.
Dyer 149 pl 4
Rolls 597.
Do — 603

Cro Eliz 810

Cro Eliz 810.
2 Roll Rep 173
Rolls 39 235.

2 Black 1143
Do — 375

Real property the Creditors by simple Contract
can't take advantage of the Statute and levy on the
3 Rep. 430. Land because in England simple Contract Creditors
Tue. 6 Ed. 4. 21 have never any original Claim on real property
Hobbard 66 only: Lands are liable only for Specialty Debts
Lovelace 93 And though there be Statute Purchasers
former rights they have no new ones. a fraudulent Conveyance conveyed a Creditor no greater
advantage than he had before.

Debt in an Action against the Heir
5 Coke 60. on a Debt of the Ancestor if there was a fraud-
Holt 72 dulent Conveyance made by the Ancestor
Co Eliz 233. Grantor. it will be deemed no Conveyance
the Heir can't plead no Assets by discent for
the Land conveyed descended to him in Law.

In Cobbin's Case there is a wide difference in the
respect betwixt Debts by simple Contract and
Specialties

And the Principle is cleared
Co Ja 271. so far as considering a fraudulent Grant
2 Keb. 587. as no Grant. that the Vendee in those Cases
Yelverton 197 is considered and may be treated as an Executor de son tort. if he takes possession after
2 Leonard 223. the death of the Vendor.

To determine when a Person may be
thus treated the following distinctions are
to be regarded. viz.

Co Ja 271. If the fraudulent Grantee takes
upon him

possession of the Goods even with the Consent of the Widow Exx — if before Probate of the Will or if there be no Will before Administration granted. he may be treated as an Executor "de son tort". — I doubt the reason for extending this rule so far as this unless it is to be cause the Law (as Robert says) has a peculiar aversion to fraud.

3 Leon 57. Bull NP 258. Rob 1 293-4 2 Roll 587.

If the Widow take the Goods without the consent of the Executor after Probate of the Will he may be sued by the Executor as a Possessor

Cro Eliz 810 Rob 1 591.

I confess I don't easily reconcile this rule with that which declares that a grant of the Grantor himself and his representatives &c the Grant is binding. — Perhaps however we may explain the difficulty in this way — that though the Grant be valid against the Grantor and his representatives & strangers who have no notice yet when it is necessary to be set aside for the benefit of "bona fide" Creditors the Grant shall not be valid against the legislatives and the representatives in such case may be allowed to claim & set aside the fraud and sale for the benefit of Creditors.

Cro Jac 270 Rob 1 485-6 D° 643. 661.

In Court as those before remarked the possibility of a diseased person can't be taken on an Execution — I suppose the Goods are seized on a fraudulent sale or conveyance before the

before the death of the Vendor, or a Reward by the permission of the Executor, or Administrator what remedy have his Creditors? — —

J. Grant Esq. This question is entirely new; the case has never occurred in Court. — The Creditor himself can't take them, on an Ej.t — the Executor or Administrator can't sue for them, as they being Representatives of the Vendor are bound by the Conveyance. — —

Robt 601 2 Leonard 11 5 Coke 60. Plowden 441. Cro Eliz 405 Rob G. 601-9.

If an Heir makes a fraudulent Conveyance of an Estate descended from his Ancestor, with a view to defeat the Creditors of the Ancestor, such Conveyance is void under the 13th of Elizabeth. — A Purchaser in the same with regard to Executors and Administrators. — —

These cases of Grants by Heirs Ej.t & Admrs — are instances of the liberal extension of the Statute for the prevention of fraud. — Third

2 Vern. 616. Cases are none of them within the letter of the Statute. The Heir does not defraud his own Creditors and so do the others, but these cases are within the Spirit of the Statute.

In cases where Equity is obliged to enforce a will it may pursue the Assets of the Testator into the hands of the fraudulent Grantee. —

1 Atk. 463 2 Ves. 149. Tho' neither in Law nor Equity, will the rights of a "bona fide" Grantee for valuable Consideration be disturbed. — —

How far is a fraudulent Conveyance bind-
ing on the parties ?. Section II

It is binding on the Grantor Ca. Jac. 270
his representatives and all who claim under 2 Mod. 280.
him as Volunteers. as Heirs Devisees Legatees &c Rob. 104
for them can exactly his rights or else they are volunteers. B. 485; 641
B. 644-657

And the rule is the same in Equity as Rob. 660
in Law. That is with Regard to executed agree- 1 P. Cont. 341
ments. for as a general rule Equity will not en- 2 P. 245 - 248
force a mere voluntary executory Agreement. 1 Vern. Jr. 51.
Ambler 405.

The reason is that the intervention of Cash is
always thus. presumptive. and where there is the least
appearance of fraud or any reason to suspect it Equity
will not stir to assist a party whose right else
were doubtful. All voluntary Conveyances
are viewed as somewhat suspicious in themselves they
are somewhat extraordinary.

Under the Gen. Rule laid down it has been 6 Coke 18
determined that Administration granted to a Rob. 644.
Stranger

So where the Grantor attempts by any Eq. Ca. Ab. 68.
Collateral act to defeat the voluntary Convey- Rob. 648
ance - as by getting the Deed into his hands and D. 654-5.
destroying it. Equity will sometimes interpose and
enforce it.

It follows from a Gen. rule that 1. Atk. 625.
no one can defeat his own fraudulent Convey-
ance.

1 Vern. 100 Conveyance by his Lad & Wife or a testamentary
1 Vern. 132 direction of her Husband as it is equally binding on
her Volunteers &c and he only shall be allowed to revoke it directly.

So where a man made a voluntary Settlement on his Wife & during Coverture and afterward attempted to convey it by Will. 1 Ch. R. 235 & 2 Ch. R. 235 & 236 but though a voluntary Conveyance bind the Grantor yet any remainder limited in it may be conveyed (as an Equity of Redemption of a voluntary Mortgage) for that is his own original right. the Mortgage is made as to creditors & purchasers but as against the Mortgagor it is "pro tanto" the grantee then only stands in Equity as he did before

A voluntary Bond for a sum certain is good in Equity if given in Marriage with the Claims of Creditors" for this is good in Law and Ch. will not relieve it as it would be in Law

3 P. Wms 232 1 Vern. 514

The executory Grants or Agreements in Consideration of Consanguinity or natural affection only will not be enforced by Ch. if made to one further removed in Consanguinity than a Child to a Grandchild it will not be enforced

2 Vern. 582 Rep. Ch. 64

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Ouster by 1 Gent to Esq. 1872

The action of Trespass of which we have just been treating, * we may remember, lay for the redress of Injuries committed on the Land &c of another while in the possession of the owner

Ejectment on the other hand affords a remedy to him who has been ousted of the possession — the object of which is to restore the possession to him who has been wrongfully deprived.

3 Bl Com 167. D° — 199

Trespass supposes him in possession — but Ejectment supposes him out

Ouster, is an Injury by which the Tenant in possession is wrongfully turned out, and "ex vi termini" implies that he who has a right of possession may turn out one wrongfully in possession.

The injury then for which an action of Ejectment is brought is called an Ouster the object of which is to restore the possession.

3 Bl Com 169 D° — 199

Ouster may be either of the Freehold or of Chattels Interest. — Ouster of the Freehold is called a Disseisin but of a Chattel a Dispossession. — For an Ouster of the Freehold a Real action lies — of a Chattel an action of Ejectment.

For the different species of Ouster vide 3 Bl Com 169

* this letter is misplaced by mistake in the arrangement

Ouster is a generic term, and the Genus of which Disseisin and Dispossession are distinct Species.

With respect to the Remedies of Ouster & Tolacet there are only of two — viz.

Vide 3 Blacn. 191. for Real Actions

— Ejectment by the Comn Law. and Disseisin by the Law of Comn. — All those remedies of which Ouster & Tortious are Real Actions, which are altogether disused. —

3 Blacn 199 & 1 Dic 427 5 Coke 105 5 Bac. 100.

Ejectment is an action by which a Estate for Years when entered uncover the possession with damages for the injury.

Disseisin in Comn is an action by which a person disseised of his Freehold recovers it with damages. — In common parlance these actions of Disseisin and Ejectment are confounded — though improperly. —

Quo Disseisin in Comn is a mixed Action & recovers Real property as well as damages. In England Disseisin recovers only the possession without any damages.

3 Blacn 199 Comyns & Rebert 250

Ejectment is frequently called in the English books a mixed action though not strictly correct — as Real Estate is never recovered in Ejectment but only recovered possession of a Term for Years. — See Blackstone

3 Blacn 118

definition of a mixed Action see margin —

The Action of Ejectment has indeed in
3 Co. Com. 157 modern practice undertaken a more
D°. — 200. large question of Title to real property
than anciently. It received only damages and
not the possession of the Lands for by fast more-
over which he had no specific remedy —
because Terms for years are considered as per-
sonal property. —

If the Lessee was evicted by the
Lessor he might recover his possession notwith-
standing any action of Ejectment but in an action
Adjuva of Covenant broken. — But at Com. Law if
the Lessee was evicted by a Stranger he could not
recover the possession of the Stranger directly
though the Lessor might remove it in a Real
action and then the Lessee might recover it of
the Lessor upon the Covenant for quiet enjoyment &c

While this remained the rule of Com.
Law the Ct of Chy perceiving the defect of
justice intended and compelled the Strang-
3 Bl Com 200 doer to make specific restitution and after-
D°. — 202. wards the Ct of Law in imitation of the Ct both
the same course.

But even now the form of
declaring is not altered so that a Declaration
3 Bl Com + in Ejectment in England don't claim possess-
Mitford 52 ion but merely damages. — as see
1 Rod. 438 In our action in Com. Pl. we demand
possession although we can recover it.

The Law as early as the reign of Edward 4th gave a Juriſdiction & remedy by this action and though originally founded on the recovery of poſſeſſion of a Term for years it has now and ever ſince the reign of Henry 8th by a ſtring of Legal fictions become the moſt uſual mode of trying the Title to Real Eſtate &c. —

3 Bl Com. 201.
2 Burn 667-8
2 Bac. 160.
Do. to 166

See how fictions well eliminated by Blackſtone. 3 Bl. Com. 200 to 205.

In Covin, an action is not founded on any fiction at all. Poſſeſſion has been recovered by an action of Debt for Rent whether it be for Freehold or a Chattel real —

3 Bl Com 205

Since the action of Ejectment has been employed to recover poſſeſſion, no other than nominal damages are recovered, becaus the action of Ejectment is in effect a real action, and damages are never recovered in any real actions except of Waſte.

2 Bac. 181
3 Bl Com 187.
6 Coke 7.
1 Saund. 252

So far as it ſounds in damages, it is a Truſpaſs and in action of Ejectment you can't recover by relation for the intermediate Truſpaſs. The common practice therefore after you have recovered in Ejectment to bring an action of Truſpaſs for the meſne profits &c. —

Thus far of the General nature of Ouſter

For what subjects this Action will lie

3 T R Com 206
Bull N P 99
Cro Chas 202
Do 492
Cro Jas 140
Ld Ray 789
Stra 54
Gilb Dis 427

The Gen rule is it will not lie for any thing of which the Sheriff can seize and take or Corporal possession or in other words for any thing on which an entry in fact can be made. — i e It wont lie to get to remove incorporeal Hereditaments or things lying in Grant merely because of this possession can't be given —

explained in
1 Burr 143
3 Burr 34
Ref 104
Gilb Dis 428
Do 390-1
1 Roll R 118

Or the same principle an action of Ejectment wont lie to remove a right of Way nor because the right is incorporeal —

But the action will lie in favour of the owner of the Soil on which a Highway is laid as he has still the Soil in himself and Granted only a right to pass over called an "easement"

Stiles Cases
1 Roll R 118
1 Gould Dig 67

In pursuance of this rule have been uniformly the determinations of our Courts in Ejectment for more than half a century past. But recently our Supreme Court held that the Proprietors of a Township could not maintain this Action against persons entering a Highway &c — It is impossible to determine for which purpose this decision went.

Cro Chas 162
Do 1120
2 Bac 167
Hards 363
Do 401

This Action lies in favour of the Grantee or owner of the Inheritance of Land though the Land belongs to the Grantor for the Lessee has the possession or at least right of possession of the Inheritance.

But it is said this action will not lie to-
come a Water Court &. because it is fluctuating — Yelverton 143
and not capable of a delivery &c — by this it 2 Bl Com. 18.
is meant that it Can't be recovered — "no remind" Popham 67.
but it may be recovered as "Land Covered with Water" Cro Eliz 428
Bracton 42 b

This action need not be brought for an
entire thing — it may be for an undivided
part of a Tenement or Building, and it is not
material whether he sues for a part or the whole Keyl 695.
for he is not bound to prove Title to all he claims Cro Eliz 428.
formerly indeed if the Pltff sued for one entire
piece of Land he could recover no part of it un-
less he could prove his Title to the whole. but
it is not so now — he may now recover so much
as he is entitled to. whether he sues for a part
or the whole.

Who may maintain this Action.

In general no person can maintain this 3 Bl Com 205
action unless he has at the time the right of Do 179-80. 191.
entry or right of possession — because the action Cro Eliz 430
is founded on a right of possession. — and the Do 447-8.
Tenant of Freehold could not sue the Pltff un- Ld Raym 565
less he had the right to enter. — 3 Bl Com 171-2.

By the Stat 21 K James 1st called the
Stat of Limitations. if the Defor of the Pltff 3 Bl Com 205
has in England been out of possession 20 years Cro Eliz 431

leaving the right of possession. he is barred of his
Bac Ab N. 102 right of possession. b. The Defendt. however
must have had the right of possession or entry
during the 20 years for the Statute does not run
before the right accrues.

So where A makes a Lease to B for 20 yrs
(or more) and B the Lessee is ousted. now this
act bares him any length of possession while the
term for years exists because he has not the right
of possession or entry — he can be presumed to
have abandoned his Title therefore.

4 Cont. 354 In Court and Statute requires the term
be but 15 years possession to gain a Title.

Both the English and Court Statutes
have the usual exceptions, and savings
in favour of Infants Idiots Femme Covert
persons Insane imprisoned or beyond sea.

If the Statute has once begun to run
any intervening disability will not stop it nor
does it prevent the Statute bars. — —

Where a Woman after the Statute began
to run married — So also where the right to
sue after the Statute has begun to run, leaves
an Infant Son. in both cases the Estate is
barred. in England in 20 and in Conn. 15
years from the time it began to run. even
though the Party should remain under a
disability.

Bac Ab 502
Say 114.
Salk 421
Esp Dig 432

The reason of the last rule is that the saving in the Statt. in favour of persons under disabilities extends only to persons under some disability at the time right of possession accrued. Authorities supra

Under the English Statt. the possession of the Lessor must be an actual possession and not a presumptive or constructive one & if time for he can't prove a possession in fact within 20 y. can. he must be barred. Bull N.P. 102 Smyth 1142 Falk 421 Esp D. 7th 432 * 21 Jac 1 c 16

In Cont. the right of possession is in sometimes deemed equivalent to actual possession when there is no other person in possession. So in Ejectment a right of entry will support this action.

It has been supposed that if the Pltff. has brought an action within the 20 years and was barred. he would not be barred by 20 years possession from the time the Statt began to run — but this is not so. Esp D. 7th 432 J. Gould Esq.

A continued possession of 20 years in England or 15 years in Cont. will not only bar an action, but enable the party acquiring a title by possession to maintain an action of Ejectment. 7 Johns. 492 Esp D. 432

In England such a possession confers the possessory title only — not an actual title to the land. 3 B. 179-80 D. 191-2.

1 Roll. Ab. 50. 68 In Ejectt on the Custom, 15 years Possession
D° 151. 412 convey'd a compleat and absolute Title to the
Ld 3d 283 Land — Quaere as the who has the Title shall
recover without actual entry, the right of Possession
it follows that

But Possession to give Title must be
that of Tenant at Sufferance must be an adverse
Salk 285 Possession. i.e. as against Tenants who has the
D° 423 right of Possession. —
2 Ray 1140 Hence 15 years sole Poss-
5 Burr 2604 ession by a Tenant in Common or a Joint
1 Inst. 198. Tenant will not Bar. Because the Possession of one
is the Possession of both. and the Statute
no evidence that shall hold against the other.

See Mortgagor continuing in possession
8 Page 83 Journal Cas. the Mortgagees right Bar. —

Although in Common the Possession of Joint-
5 Burr 2604. Tenants is the Possession of both. yet if the
2 Ron. 182 Possession prove an actual ouster of a Continu-
E. 4 Dec. 434 ance with a Possession of 20 years. the Statute
operates, and may bind the Title by Possession

What is an adverse Possession is a question
of fact proper to be left to a Jury.

Cas. Ejec. 217 How far the bare Possession of a Joint Ten-
E. 4 Dec. 434 ant or Tenant in Common is no evidence of
any greater length of Possession may be a proper
~~question~~ Question for Counsel

If the Party in Possession who has been in
for the 20 or 15 years. declines and a new Party
enters. This Possession is not adverse and will Bull N.P. 103
not acquire any Title. - holding under the Same Ejt Dic. 435.
if another is an acknowledgement that he holds under
his Title. So a Lessee for years has no Possessory Title.

There has been two or three very strange Cases
or decisions on this Stat. in Connt. which have Root 68
neither reason nor principle to support them. As D° 222.
of a late Decision in New Haven County in the D°
Case of Bryan & Atwater.

If a Pff has no right of Possession and could
not have entered within the 20 or 15 years. but Cowen 218.
the Stat. does not run. Eg. To A for Life rem.
to B in fee. and A lives 20 years. but
B could not have entered during that time
therefore the Stat. does not run agt. him.

Suppose the particular Tenant in this
case is disseized and the disseisor continues
in Possession. it makes no difference, for his
Possession is not adverse to the Possession
right of the Remainderman, for his right of
entry does not accrue until the determina-
tion of the particular Estate. -

And when an adverse Possession is relied
on. in order to claim the Party claiming under Ejt Dic. 435.
it should shew some proof of actual Ouster Bull N.P. 104.
of which presumptive evidence may go to the
Jury.

The action of Ejectment is founded on a Clause in a Lease giving a right of Entry on Condition broken — Actual entry is dispensed with & the Action of Ejectment substituted in the room of the ancient Writ of Entry in the nature of an Assize with actual entry, but the Defendant to be permitted to defend must enter into a rule to confess entry, ouster &c as the Condition on which he may defend. — These are done pursuant to Statute

Doug. 16
Doug. 446.
3 Burr. 1897
Ep. Dig. 451
D°. — 435.
Burr. 103.
Cowp. Rep.
2 Bac. 173
1 Ed. Ins. 233
Vent. 42
D°. — 332.
3 Rule 218
Salk. 340.
Page 47

The rule that actual entry is not necessary by the Statute is General. — entry is necessary only for the purpose of commencing the Suit, title & cause thereof accrues when right of entry accrues &c — but where it is necessary for the Plaintiff to make entry the Defendant if he would make an actual entry &c

Doug. 467.
3 Burr. 1803
Bac. Ab. 163
Stra. 1086.
Salk. 256.

As a Gen. rule the Assize or this action must have the legal right of possession in the legal title to sustain — For this reason there are however one or two exceptions of which hereafter. (at the page 422 V)

Doug. 21
Ep. Dig. 435
D°. 436.

Hence a Mortgagee may maintain the action either before or after the day of payment against either a Stranger or the Mortgagor himself or even against a Lessee under the Mortgagor for the Mortgagee

has the legal Title from the date of his Deed.-

But if Land leased are afterward Mortgaged the Mortgagee cant maintain this action against the Lessee.- Esp. Dig. 435. Doug. 33. Dig. 269.

This action is allowed indeed in England as a means of securing the Rent. But never to disturb the Title of the Lessee for other purposes or causes &c

The Mortgagee may recover in Ejectment though the mortgage money be all due and unpaid. provided it be not paid at the day. The Legal title remains in the Mortgagee still at the Condition is broken Ab. 214. Do. 215. 1 Vern. 187. Eq. Ca. 413. 2 Vern. 30 Dig. 279.

If a Gen. Tale. the Jurors in whom the Legal Title is may recover in Ejectment though the Equitable Title in another & even in the Mortgagor himself. 8 Mod. 122 Bac. Ab. 96. 1 Ch. Ca. 60. 2 Do. 68. Doug. 33.

In some modern Cases the Courts of Law have taken notice of Equitable Titles as in a case in Lincolns Inn Chapel. Yea. vs Bulwell. This Case how ever was shortly agreed not to be Law. and has since been overruled. — In the Case cited the Principle was strongly disapproved by the Judges of the independent of Courts of Law & Equity by equitable Title - Cowp. 473. Do. 599. 1 Term R. 334. Do. 447. 7 Term Rep. 13. Do. 47. 663. 8 Term Rep. 516.

In Eqy. the Pff in this action must recover by the strength of his own Title and not by the weakness of the Defendants

Bul & N 710. 4 Burr 2487. Eq. Dig. 455.

If the Defendant has no shadow of Title at all he is nevertheless not to be disturbed unless the Pff has shewn that he has Title.

It follows therefore that tho the Defendant may defeat a recovery by proving the Legal Title to be in a third person

In fact

§ But though the rule is generally true that the Pff in this action must have the Legal Title, & tho it does not hold where the Defendant's Title is derived from the Pff or where the Pff holds under a title derived from the Defendt. So ow the same principle if A leases to B and B to C in an action by A against C and he disclaims the Title of A in an action by A against C and he disclaims the Title of A. he cannot claim to hold of B and dispute the Title of A.

1 Ves 744 2 Do 480. Bul & N 710. Rook 232. in which the principle was misapplied. 3 Atk 488

The Lessee of a Term for Years may maintain the action though he must under the Eqy. has attorned to the Devisee because a Term for Years is personal property and of course vests in the Eqy. the assent of the Eqy. as to the Title. though if he should dispute Eqy. title intended and give a different one

1 Ves 70 Eq. Dig. 436. 1 Eq. Ab 129 1 Roll 140

In Conv. the assent of the Eqy. is

is not necessary to enable him to maintain the action for to vest the legal Title in the Devisee because here an action for Legacies is brought in the Court of Common Law. —

In England if a Freehold is devised the assent of the Exr is not necessary, as the Devisee has the legal Title immediately on the death of the Devisor. 1 Inst 111 b. 1 Salk 306. Ca. Eq. Dig 437

The Assignees of a Bankrupt may also maintain this action for whatever debts of Land belonging to him. because all the real as well as personal Property goes to the Assignees by Stat 13 Eliz c 7 & 8 Ves 253 Doug 70

The Committee of a Lunatic cant maintain this action in their own name for the recovery of Land belonging to him for the Title is his and not theirs. and they cant make the necessary Lease. it is therefore supposed to be made in his name by authority of the Court of Chy. Holt 215 Hutton 16 Willes 130-1

In Court the action is brought by the Conservator of a Lunatic in the Lunatics name as no Lease is here necessary. — 1 Comm 383 Dr 384

If an Exr or Administrator is ousted of a Term for Years he may maintain this action for Recovery either in the name of the Testator or of himself. 4 Co 95 a 2 Salk 20. Ca. Eq. Dig 439 3 Ves 13.

7 Coke 17
4 Rep. 350
2 Bl Com 349
D° 274. 293
1 Bac Ab 2. 3. 8.
D° — 129.

By the Com. Law no Alien can maintain
any Suit or action for he can't hold Land
I conclude an Alien friend may maintain an
action touching or concerning Goods & Chattels &c.

How far this rule of the Com. Law
holds in the several States of the Union, I
can't exactly know, though I doubt in some

4 US A
Vol. Page
4 — 433
6 — 74
7 — 136

The rule can't hold as to persons residing
& admitted to the Laws of the U S A. such
are admitted to all the substantial
Privileges of native born Citizens. (—)

3 Bac Ab 180
D° 901. 15. 8

The Lessee for Ayers may maintain
this action against the Lessor himself as he
has admitted his Tenancy & the legal right of Possession. (+)

Pleadings in Ejectment

1 Saunders 7
1 Salk 255
3 Wilson 274
4 Term 680
Bull N P 105.
Ejectm Dig 444
D° 447-8. 459.

The Declaration must state the Plff's Title
and should state it as it is. and it must
appear from the Declaration that there is
a subsisting Title in him at the time of
the action brought. — for if he has none
he has no right to recover. — and the object of
the action is to inform the Poss[essory] Title

3 Ejectm Dig 448

But it is not necessary in England that
the Plff lay his entry or any particular day
in his Declaration which he delivers his Lease

and afterwards his entry for an entry after
actual or fictitious is necessary. ——

This seems a deviation from the Gen.
Law rule of pleading or declaring in such
cases for which rule it is given no other reason
for in Books than that the Precedents are
so. in fine still indeed a modern reason for
this rule viz that the entry of the Plff. cannot
now be traversed. —

In Covt it is not necessary to aver that 1 Saunders 7
any actual entry of all Mat matter Bulst 106
should always be laid as having been after Cro Ja 96
the Plff title accrued otherwise there is no
cause of action.

So it is not necessary to allege
the matter to have happened on any particular Cro Ja 311
day — it sufficient that it be alleged to Cl. Dig 445
have taken place after the title accrued D°. 446
to the Plff and before action brought. ——
because matter is not traversable. —

Mr Gould says the case cited in Espinasse J Gould Esq
is not correct Law for every traversable fact
must be precisely laid as to the time &c or
it will be demurred.

The Land or Subject sued for must 2 Bac 168
be so described that the Sheriff may know 3 Wilson 23
what to deliver possession of in Ex. 1 Burr 630.
Formerly great precision was required 5 Burr 2673
on this subject, but a new rule is made. Cowp 350.
1 Term Rep 11
1 East 241

reduced to that the old Authorities can hardly be limited. it must be now described with convenient certainty. The description must correspond with the Land which the Sheriff shall shew the Sheriff —

Sackay. 161
D^o — 1470.
Comyn 350.
1 Bun 629
Say^c 71
D^o — 1063

In Conn^t the Subject is usually described by the Town or Society in which the Land lies by its Boundaries togather with the estimated quantity, but it is unusual to describe the quality of the Land

In England the Boundaries are not usually given, but Land is described by the Parish in which it lies. and by the species or quality of the Land as arable. meadow. pasture. Timber and also the estimated quantity.

1 Coke 55.
7 Ry 333-5.
2 Bl Rep 706
3 Wilson 23
Salk^d 2. 54.
1 Saunders 295
Bul & N. 109.

If the true description varies materially from that given in the Declaration it will fatal and the Pl^ff will be nonsuited — So if the Land is described to lie in the Parish of A and it lies in B. — So in Conn^t

2 East 497
D^o 499: 501-2
2 Bl Rep^s 706

But neither in England nor in Conn^t is the Pl^ff bound to describe the quantity. he may recover for a smaller quantity than he declares for he can never recover more in a Court of Justice wont give a man more than he asks. but the Pl^ff is permitted to

Cro Eliz 13
2 Rolle 734
3 Levin 334
Com^n 260
1 Bun 320

waive the matter of this Case

And if the Pltff declares for a long or Term that he really has he may still recover for so much as he has proved for the great question is whether he had the possession, right ——— Bull N.P. 106 Esp. D. 447 Do 448

The Pltff must in England and in Cont must prove the Defendants possession at the time of the action brought else there is no cause of action — and though the Defendant must confess a Lease entry & ouster in England yet he may be permitted to prove that he was not in possession at the time of the action brought 17 Vin Abr 220 3 Bulst 80 10 7 Rep 32 b

The two Cardinal Points of fact to be proved by the Pltff are that the Pltff was entitled to the possession at the time of the action brought and the Defendants possession at the time. —

Pleadings on the part of the Defendant

The Gen Issue in this as in all personal actions standing in Court is not guilty. 3 Bl Com 305 Appx 9, 10.

In England special pleading does not occur in this case the rule as to the Defendant confessing Lease entry & ouster requires that he should plead the Gen Issue. ———

When the Title is to be tried the Defendant must plead the Gen Issue. This action is of an higher nature than a Trespass Hurlst 305 2 Swift 79

Vin Abr

therefore Dur[ham] is no bar to this action as
7 Rep 354 between the same parties. This rule held
in Cont[inent] as well as in England. . . . .

Evidence.

I have said that the Pltf must recover by the strength of his own title
Bull N.P. 110 and not by the weakness of the Defendants.
Esp. Dig 450 Proof of title in a third person is therefore a good defence for the Defendant. but
Dur[ham] 457. the title must be good and subsisting title
a mere presumptive title will not be sufficient

Where the Defendant claims under a
Lease either void or voidable. a recovery
may be had against him by this action. for
if void it is no Lease at all. and if voidable
the action of Ejectment is the proper way to
take advantage of it.

But it may happen that the Pltf
as against the one in possession under the
invalid Lease loses or wishes his title or
right of recovery by some act of his affirm-
ing the Lease of the Defendant.
Dom[s] 50
Co Litt 252 But it may be objected. that a Lease
Esp. Dig 464 absolutely void cannot be affirmed or
made good by the Pltf - it is no Lease, and
"ex nihilo nihil fit."

7 Co. 5. 211 But if the Defendant claims under a

a Lease only void & c. It may be confirmed either expressly or impliedly — As where A leases to B with condition that B shall not lease without his permission yet B lets to C & A treats the tenant as his own &c. 3 Co. 64. Co. Lit. 483 D° — 803 Esp. Dig. 465.

Verdict and Judgment

The Plff is to recover according to what he proves title to though it may be different from that stated in the declaration — So if he declares for a Term of 10 years and proves title only to 5. he shall recover for five. — So also where he declares for a given number of acres he may proceed as to so many & have a judgment for a less number

And if the Declares for several Distinct subjects he may recover part or the whole of them as he shall be able to prove title to them. Cro Eliz. 186 Esp. Dig. 490.

If the Plff declares for Land only he will recover of course. Houses &c. pass for they are a part of the Freehold. and included in the general term of Land. Dyer 47 a Esp. Dig. 491 2 Roll. Rep. 17. 18 Com. Dig. Action — A

"The writ of "Habere facias possessionem" issues on a judgment for the Plff to the Sheriff. Commanding him to put the Plff in possession. — This Writ cannot be evaded by the Defendants going out and putting a Stranger in possession. Salk. 258 5 Bac. 178 D° — 179.

5 Co. Rep. 91
2 Bac. 179.

The Sheriff in the execution of the Queen's writ may, if necessary, break open the outer door of a House to put the Off. in possession.

1 Roll. 73

If he be driven to bring Trespass, the Off. having taken possession of the Land pending the Suit, may still recover his Costs and damages, & enter a judgment for recovery of the Land if necessary.

4 Burr. 1801
Cowp. 454.

In England Leave & Release is a good plea in Bar by the Defendant. But if the possession is taken by the Off. after Office found the Defendant must plead it puis darrein continuance to admit the plea pleaded.

7 Mod. 328
Stiles 1050
1 Ld. Raym. 283

If the Jury find for a Fine the action is lost by their Verdict, the proceeding of the Suit the Off. will still have Judgment for damages and Costs and that only.

2 Bac. 180
1 Roll. Rep. 779

If after the Off. is put in possession under the Writ the Defendant or a stranger enter & the Off. may either have a new writ of possession or recover an Attachment against the Defendants for a Contempt of Court by virtue of which the Off. will again recover the possession.

4 Burr. 2334
Cowp. 1006.

In the English action of Ejectment if a Verdict is given for the Defendant the Court will seldom or never grant a new Trial

for

for the Pltff although the judgment may have been against Law & Evidence yet he may bring a new action by declaring new fictitious parties. - and you can't plead the former judgment in bar because this for though the real parties are the same the nominal parties are different — 5 Bac 253 Co Lit Dig 493.

But if the Verdict is for the Pltff. the Defendant may have a new trial. this as well as any other action. for though he may have a new action yet if given he is a new action against him the Pltff. he may be injured. as there will be a change of Profession. - besides the Profession of a trial may be their only title. - What formerly holden that a New trial could never be granted. but this is not Law. 4 Burr 2224 5 Bac 354 Salk 648 D° - 650. Ld Ray 514

In Ejectt a new trial may be granted for either party. as in any other case a Judgment is here a bar. unless reversed as we have here no fictions in our modern Trials. &c.

Action for Mesne profits.

When a Verdict and Judgment are given in favour of the Pltff. and his Title is established. it follows that from the time of the Ouster the Defendant has been a 3 Burr 1765 Salk 638.

Trespasser

Co Litt 182 a Defendant before judgment in Ejectment the Plff may take an Attorney the Land upon as against him for the Defendant and for the mesne profits — and the rule of Damages is in General the value of the
3 Wilson 121 Land during the Defendant possession. Lawes of Weight as vendible and Damages and some time ones

This action for mesne profits must
1 Bac 181 be laid with a "Cur Vi et Armis" it cannot be
2 Ves 977 Ld Red Litt 402 but in the Kings Bench as it is real by writ &c.

This action of Trespass for the mesne
3 Wilson 121 profits is incident to a recovery in Ejectment

It is said Particular Damages the Plff in stead of bringing an Action in either of the above ways may file a Bill in Chy to
1 Ves. Jr. 103 account for the profits accruing to the Defendant during his Possession. Which would be a Relief for Years or for Life

2 Ves & Bea 308
2 Bac Ab 181
+ 2 Wilson 119 The necessity for this second Action arises from the Ordinary Rule in Ejectment the Damages are but nominal

It has been holden however that the Plff
2 Barnes 59 may recover his actual Damages in the
+ Cas Pra 305 Action of Ejectment — This is questioned by the
2 Bac Ab 181 Editor of Bacon. For myself I think the Case
Butler's Note. is at in the common Form of the Declaration though Good &c may be run not by a different Form &c.

In Ejectment it is agreed that full damages may be recovered in an Action of Ejectment and it has of late been thought not unusual.

In this second action it is not necessary to prove that the Defendant wrongfully entered on the Land and ousted the Pltff. for the same may be in the action of Ejectment, in conclusive evidence of those facts. It is only necessary for the Pltff to produce the record of the judgt in Ejectment

6 Mod. 229
9 Vinner 424

The Pltff is not however confined in this second action to the time of the Lease and Entry as laid in the Declaration of Ejectment in Ejectment you have an antecedent possession presumed, and an ouster must be proved by the Defendt which may be proved for the purpose which are antecedent to the ouster in the Declaration in Ejectment

3 Bl Com 205.
Bull N P 87
Esp Dig 494

But where it is an Action, where the Damages are to be ascertained if the Pltff sues for the profits accrued since the time of the Lease laid in the Declaration in Ejectment the record of the judgment in that action is conclusive for them — but if the Claims before the Ouster laid in the Declaration in Ejectment there record in Ejectment does not prove it The Defendt may say nothing ever happened to the Pltff title

3 Bl Com 205
Bull N P 80
Esp Dig 494

3 Wilson 131
Ejt Dem 494

In the Common Case proof of the Lessors and Ejectment are sufficient to find the Defendant Guilty of the Trespass laid in the Declaration

+ 1 Sedwick 330
Ejt Dem 494
Dem 495

And if the Sheriff officer having summoned an Ejectment & Inquiry on the Writ of Enquiry against a Common Trespasser. The Judgment in Ejectment is no evidence against the Stranger who has not confessed. Because that is evidence only between the same parties. — He must therefore lay open his whole Case. —

Ejectment 494
Dem 495

The ground to be pursued on a Writ of Inquiry of Damages in Trespass after Judgment in Ejectment is that on being restored to Possession he is considered the Tenant as having been continually in Possession

Bac Abr 88

That action for mesne profits comes within the Provisions of the Statute of Limitations as do all actions of Trespass. —

Bac Abr 88
3 Com Dig 373

In England the Period limited for the bringing the action of Trespass is Six years and in Connecticut three years

In England the action for the mesne profits may be brought in the Pltffs own name or in the name of the nominal Pltff. 1 Burr 665
The Court by their discretion controul the proceedings in this action, and adapt it to the ends of justice. If they see an action is brot in the name of the nominal Pltff and he releases the action it is a Contempt of Court. 3 Com 305. Bac Ab Ejectment. Salk 254.

The one tenant can bring an ordinary Ejectment against his Co-tenant yet if he recovers, in Ejectment he may maintain this action for the mesne profits. for it is incident to the action of Ejectment. 3 Wilson 118. Esp Dig 495 Co Lit 200. Litt Sect 322. Salkeld 392.

Finis.

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Trespass. by J. Gould Edn. 1812

Under the Gen.l Title of Injuries to Real Property. the injuries which may be done to things Real are at Comm.n Law 4 viz. Trespass. Ouster. Nuisance. Waste. Subtraction. and Disturbance. .....

Of these we uniformly treat of only three viz. Trespass. - Ouster and Waste.

Disturbance and Nuisance are treated of under the Title of Actions on the Case. - and Subtraction is wholly unknown to our Laws.

1st Of Trespass as regards things Real.

The word Trespass in its most extended sense signifies any transgression of Law or any act of one man whereby another is injured. - - - -

But in the more limited sense in which I am about to treat of it it means the entering on another Lands Tenements or Hereditaments without lawful authority and doing some damage. Every unwarrantable entry on another Lands is a Trespass. is called a Trespass by breaking the Close - and such entry always implies some damage at treading or treading down the Herbage &c. and even the walking over a field in the Night. when Crop with Snow is Trespass for which the Law gives an action &c.

2 Bl Com 209.

2 Bl Com 209
D.o - 210
Fitzherbert
N.C. Bro 87
Cases Dig 380

Every man who holds Land is lawfully Lay
2 Roll Abr 809. the Lord right to the possession of it. But he who
Fitzherbert enters & lawfully May the possession while he
Nat Bre 87. continues on the Land. and that is an infring-
Esp Dig 380. ment of the owners right and consequently an in-
jury.

To constitute a Trespass the entry must
8 Coke 146. be unwarrantable for entry is not many Cases
2 Roll Abr 812. lawful without licence from the owner as of
Esp Dig 380 to execute a process to make a lease &c
make a distress. Abuse of time is any waste
committed on a division &c. to enter a common
Inn &c

10 Coke 40 But if a man Leases Land with Free ex-
11 Coke 52 ception of the Trees he may enter to take them
Sheph 89 away &c
Esp Dig 381.

So also one may lawfully enter on the
3 Bac Abr 180. Land of another to search & count for
3 Bulst 63 Hue & Cry for the good of the public. & the Con-
Cro Jas 331. stable for them there without Guilty &c
2 Roll Rep 213 But for an Arrest it is not safe. Unless in the
12 Rep 334 Case & to the degree to which one should dispose
He might (in the case) mistake the Murderer
3 Bac Abr 180 the Wrong Man. But no man has a right
2 Bulst 62 to enter to hunt any other than Game
Salk 556
Esp Dig 444

Com Dig Trespass These are some authorities against this
Title Trespass (D) doctrine Hawkins Coke & Bynkershoek the weight
or (B 2) of Authority undoubtedly in favour of the rule
2 Hale 558. as I have laid it down

It has been the opinion of many able Lawyers in England, though it was long unsettled that the poor in any Town had a right derived from the Statute of Leasing to enter on their neighbours Land for the purpose of gleaning after Harvest. - but it has been lately settled in the Ct of Comn. Pleas that they have such

1 H. Bl. 51.
3 Bl. Com. 212
Gilb. Ev. 253
Esp. Dig. 413.

Where the Law gives a license to enter on the Lands of another, any subsequent unlawful use of such license or authority makes the party a Trespasser "ab initio" by relation, because it is said the presumption of Law is that he entred for the purpose of committing the Trespass or unlawful act. -

3 Bl. Com. 213
8 Coke 146.
Croke 148.
2 Rolle 561.
Esp. Dig. 381.

This Law can at best be the true reason for the Law never regards the intention, for it is not material to constitute a Trespass

The true reason as I conceive it to be is, as Mr Gould says, is that the Law annexes a sort of tacit condition to such license to enter, which by such subsequent unlawful act or abuse of it is broken, the privilege is withdrawn, and the party is considered as having never had any such license, and thus is considered as entering without any authority, and for the purpose of committing the unlawful act

Further when one acts under the license of the Law he is bound to do some future act for the purpose of consummating what the

the Law allowed him to do. and by the next clause of this last act the Court say that the act under the authority of Law for the Law always supposes until the Contrary appears that he has done this last act. for in what a further act is necessary to legalize the former act the omission of this subsequent act leaves the first illegal &c. —

3 Bl Com 213
Cro Jac 147
1 Rep 12.
Finch Law 47
Esp Dig 384-3

Thus a person a Traveller having entered a Public Inn. & taken or eaten what is a lawful act he is a Trespasser "ab initio." he thereby forfeits the privilege the Law proclaims and therefore it is taken away —

So if the Landlord distrains or distrains what he has taken he is a Trespasser "ab initio." and may be sued for taking it away &c —

But as a general rule a bare non feasance or neglect of duty can never make one a Trespasser by relation. "ab initio." — Trespass is an unlawful act and not a mere omission of an act which will never make one a Trespasser thus there must be therefore an actual misfeasance to constitute a Trespass

8 Coke 147
Esp Dig 383
3 Bl Com 213

I take it this principle will hold in all cases. — that no act not in itself a Trespass can make one a Trespasser by relation. — Thus if a Traveller omits to pay his bill, this does not make him a Trespasser "ab initio." —

So in the case of a Distress mentioned above if the Distrainee refuses to redeliver on tender of amends &c he is not therefore a Trespasser. "ab initio." 5 Bac 162

There is said to be one exception to the rule. That a non feasance will not make one a Trespasser by relation Viz: Where a Sheriff omits to return his Writ after having made an arrest on mesne Process. as is re quired by Law. he is considered a Trespasser "ab initio" Thawles doth consider it so. Says M. Coulds — he is undoubtedly a Trespasser, for this case. he could having neglected to return his Writ he can't give it in evidence that the arrest was originally Lawful &c

Falk 409
D° 489
5 Coke 90
D° 636
4 Coke 67 a
1 Wilson 171
Cowper 20

"Where one enters on another's Land &c by permission of the owner, any subsequent unlawful act will not make him a Trespasser from the relation, or "ab initio."

1 Inst 142-3
8 Coke 146
5 Coke 163

It is laid down in some of our books by some unknown Author, Glanvile — that to constitute a Trespass the act done must be Voluntary — and that an involuntary act is no Trespass!!!

5 Bac 185
Viles 65
Ej: Dic 383

Now this is much clearing the Gen: Rule is directly the reverse it is now well settled and has been for centuries that the act need not be voluntary. To this rule tho' it is indeed the exception. as we in my Case.

4 Burn 2092
4 Bac Ab 2092
Dy Hawk 161.
Salk. 13
Dr. 110. 119

The absolute rule that the act must be voluntary, — holds only in a civil and descriptive Court of Cases. — But where the act complained of is actually committed by the party himself but by some other agent to shew the standing rule a reasonable relation can by Dig &c. ——
So that instead of a general rule it is to be regarded only as a particular and solitary exception to the general contrary rule

The Law never regards the intention where the act is committed by the party himself reasonable.

Hence an Infant who in contemplation of Law is incapable of volition, is liable not indeed criminally but civilly in damages for acts of Trespass. so also of a Lunatic. he is malicious intention indeed in any go to ascertain the "quantum" of damages but it is not the ground of the action. It is sufficient that he has done a forcible act which was injurious to another to render him liable to an action of Trespass.

Hobart 134.
Raymond 467.
Stang Cases
2 Rep 8 90.
13 Mod 81.
Dr. 64. 9.
5 Bacon 179.

And where one does an act with force to another, damage tho it is not occasioned by any mistake, or accident not inevitable

So if one enters another House in the dark by mistake supposing it to be his own or goes and does damage in his sleep he is liable in an action of Trespass! — But

3 Levins 37.
Esp Dig 383

But a man doing damage in a fit of the Apoplexy would not be liable as the act is here indictable and he cannot here be called the agent. 5 Comyns Dig Justices (C) 1

The rule then applies only in those cases where the acts complained of did constructively the acts of the Defendant himself. So that a man bait his Dog on another mans Cattle and the Dog chase them after they got on the Land of the owner of the Cattle — But the owner of the Dog intended to chase them there chase them no further than of his own Ld. and therefore was not liable. Now the only enquiry is whether this act was voluntary if it was he is liable if not he is not liable for Trespass — so it is only to shew whether the act was his or not. — There is always confusion in the minds of Students on this subject — 4 Bun 2092 Popham 161 Lev 13. 110 Ibid — 119 1 Gould Dig

An action of Trespass will not lie for an injury committed on Land in a foreign Country, the reason is that all real actions are local. 4 Inst 503 Hug 646 Comyns Title Justices (D) 1 Ld Raym 4 07

Now if B should commit a Battery on A in N York and they should afterwards meet in Conn. A could not for assault find there. But if B had committed a Trespass on the Land of A in N York and they should afterwards meet in Conn. A could have an action there.

N.B. a Trespass on Land is called a quare Clausum fregit — but for entering a House and a quare domum fregit 5 Comyns Dig Justices (B) 1 Tilg Lev 187-8

Who can maintain this Action?

3 Levins 209
2 Bulst 268.
4 Leonard 184
Esp Dig 383
Do — 404
Com Dig Title
Just. B 3 B 3.

As to this point the General rule is that no person but he who has the actual possession at the time of the injury done can maintain it.

Provisioners will maintain trover that is such a one as has particular Tenant is in possession.

The reason of this Rule is that Trespass is an injury done to another's possession the action of which is founded in possession and this action lies only to give damages for injuries done to the possession.

In Covenant it seems to be held that a mere right to possession will be a ground of action if there is no person in actual possession.

A Disseisee can't maintain an action nor can any one out of possession claiming adversely to one in possession.

5 Bac 166
2 Leonard 147
4 Leonard 184
Rowden 546
2 Swift 767

But it is said in the Books that the Plaintiff must have been in the lawful possession and that no intruder can maintain the action. — But this is true only as between the two parties. — As a General proposition the converse is true. The rule ought to have been thus. — "That possession is the Plff as against the one in possession must be lawful — for it need not be lawful as to third persons. because this question does involve the question of Title.

Laws on Pleading 156
1 Ca Ab 244 6
3 Burr 1563
11 Coke 51
Willes 221
2 Eq Ca 238.

In Jack the whole "res gestæ" - except between the Party in possession and he who has the right of possession consists in this case in actual possession and an invasion of that possession when a Stranger is the Defendant

It follows from the first & Gen. Rule that the person in whom the Freehold is cannot maintain this action for an injury done to the Freehold itself while in the lawful possession of another. Nor according to the theory of Law can he for such an injury done while in the unlawful possession of another. though for an injury done to the Inheritance, Easements and the like they may

2 Rolle 554.
5 Bac. 166
4 Leon. 184
Com. Dig. Tit. Assize B3.

There is an exception to this rule in the case of a Tenant in Tail which will be considered hereafter

In pursuance of this rule and Heir Cant at Com. Law maintain this an action for an injury done to Land descended to him from his ancestor until he has acquired actual possession. -

Rowden 142
2 Rolle 553.
Dig. Tit. 404.
Comyns Title
Tit. Assize B3.

But in Conn. this rule does not hold for he can here if there is no person in possession.

Again a person disseised cant before recently maintain an action for injuries done between the time of his disseisin and recently

2 Rolle 553
5 Bac 166.
Dig. Tit. 418
Comyns Title
Tit. Assize B3.

Exception. If the Estate of the Party entitled to possession determines before recently he may maintain an action - from the nature of the case

2 Rolle 550.
Com. Digest
Tit. Assize B2.

11 Coke 51.
4 Co. 98.
2 Rolle 554
2 Inst. 282

After the Disseisee has recovered he may maintain an action against the Disseisor for all injuries done by him between the Disseisin and Entry, i.e. during the Disseisors possession. But for an Injury committed before the possession the Disseisee is to bring an Action of Land. Contended as having by relation been constantly in possession or at least never out — and it is incumbent on the Trespasser to maintain the Contrary. So in action for mesne profits &c.

16 Vin. 253 pl. 2
Com. Just. (B)

In the above Case the action is to be laid by a "Continuando"

5 Bac. 188
11 Coke 51 a b
1 Bac. Abr. 150.
Palmer - 98
D° — 354
1 Roll. Rep. 1.
H. M. 73-4
Carter
Cro. Eliz. 540
Moore 461
2 Rolle R. 554
D° — 579
Comyns Digest
Justices 32.

But the Disseisee cannot after recovery maintain an action against a Stranger for an injury committed by him between the Disseisin and recovery. The above Action of Land does not hold here — but only between the party disseising and the disseised. The opinions are not agreed on this subject — but I take the latter opinions to be agreeable to the rule as laid down here —

Mr Gould is of the former opinion (viz) that having diseised the Grantee to B. — the same Cant maintain an action for injuries committed by B. — but why? It is settled does not the fiction extend to a subsequent wrong? — It is answered in the first place that he would be liable in Trespass to the Lord from which he has paid a valuable Consideration and

and Secondly he would be liable to answer for the same Trespass & Injury. for he is liable to the first Disseisor. — The rule of Law is "quoad actiones" — and not "quoad qualificationes." for the Disseisee may take the profits of the Land wherever he can find them. — the second disseisin doth alter the original Disseisee's right of property. — 11 Coke 51.b

But though the Disseisee cant maintain an action against the Stranger he is not without his Remedy. for he has an action against the original Disseisor for all injuries done by the Stranger. — 11 Coke 51.a
1 Inst.a 55.b
5 Coke 85
Cro Eliz 61.
D.o — 464
Authorities supra

Here may arise a question whether the Disseisee after Entry can maintain an action against the Disseisor who is a Stranger for the Conversion of the profits to his own use. — Dons 21
Hobs 334

But though the Disseisee cant maintain an action for injuries done during the disseisin yet he may maintain an action against the Disseisor for the act of disseisin itself before entry for this was done while he was yet in possession. — 5 Comyns Rushs 382
Esp Dig 404.
D.o — 458

So also the owner of Land during disseisin may maintain an action for injuries done before disseisin — for it is not material what one be in possession at the time of bringing the action. — but at the time the injury complained of is committed. — 5 Bac 168
2 Rolle 533.

5 Comyns Digest B 2
2 Roll Rep 551.
5 Bacon 167
1 East 244

I have said that any person in possession shall have Tenant of the Freehold or for years & Will by Sufferance or even a Wrongdoer in Poss which could maintain this action against any person. Shd does this appear. — But —

2 Vent 150
1 Inst 57
2 Roll Rep 551.
13 Coke 69.

But a Tenant at Will or by Sufferance can maintain this action as against a Stranger only, and not against his Landlord or Lessor. For his right is paramount to that of the Tenant at Will &c. as he may enter and destroy the Tenancy when he pleases. —

5 Bac 187.
2 Inst 108
1 East 139.

But a Tenant for Life or years may maintain this action against his Lessor himself for he cannot determine his Tenancy at his pleasure.

But though the Tenant at Will cannot maintain the action "Quare clausum fregit" against his Lessor still I shall for he may have an action against him for injury done to the Emblements for though the Tenant has no interest in the Land, yet the property of the Emblements is his — Though I find no express rule on this subject yet it plainly follows from the rules laid down before when speaking of Tenants at Will and by Sufferance.

2 Com Dig 146
Com Dig Tresp B 1
Cro Eliz 143
Esp Dig 402.
J Gould Esp

1 Vidupius 347
5 Bac 167

I find it laid down that a Tenant at Will cannot maintain this action against one who enters under Colour of pretended right but this is not Law for in this way any Trespasser may

may claim title and evade all liability by a false hood. ——

The Lessor at Will may maintain an action of Trespass "quare clausum fregit" against a Stranger for injuries which affect the Land itself. for the possession of the Lessee at Will is against a Stranger as good as the Lessors. — the Lessor is in actual possession by his Lessee. the Lessee have only rather a servants than a Tenants claiming adversely ——— Com. Dig. tit Trespass B2 Just. tit B2 2 Rolle 551.

And if a Lessor of a Term of 99 years reserves any Spark of the Soil on the Land he may not enter to take them away, but he may maintain an action of "quare clausum fregit" against any one who injures them, during the term. for the reversion the particular Spark of ground on which the trees grow is vested in the Lessee, them selves, and as to them the Lessee is a Stranger 3 Bac. 167.

If the Lessee at Will commits voluntary waste. the Lessor may have an action of Trespass "quare clausum fregit" against him for that act by which the Estate and inheritance the Lessee a Stranger. — If must be voluntary waste for Permissive waste is not tort and does not determine the Estate. — — 1 Inst. 57. a Com. Dig. tit Just. B2 1 Rolle 860

So also a person entitled to the Reversion or Inheritage may have an action for an injury done to them provided he is in possession at the — 1 Inst. 4. b Co Eliz 421 Dyer 285 Moore 302 Com. Dig. tit Just. B1.

I have said that the Plff must be in poss. of possession in order to maintain the action of Trespass "quare clausum fregit" &c, but this is only understood, & that land the injury was committed, if committed while the Plff was in possession he may maintain the action although he is dispossessed. for the right of action accrues at the time the injury was committed

Roscow 431
5 Bac 167
2 Rolle 566
Com. Dig. 87
Trespass B.D.

The owner of the soil of a Highway may have an action for an injury done to the soil the remains of highway. for the grantor in whom the soil is not divested by laying a highway over it — the highway is a mere easement the ownership of soil remains in the grantor.

Keyo 1064
1 Burr 143
3 Bac - 54
Esp Dig 428

There has been some contradiction in the Books who shall maintain this action of Trespass "quare clausum fregit" — where A lets land to B. to sow upon shares. under an agreement that B. shall have half of the Crops.

Cro Eliz 143
2 Rolle 368
5 Bac. 168

It is said in some of the old Books that the owner of the Land must bring the action alone for it is said B. cant have a joint action with A for Trespass "quare clausum fregit" for an injury done to the Crops before severed. for he is not in possession.

Still it is agreed that they might join in an action for an injury done to the Crops (when severed) but not an action of "quare clausum fregit" —

It is said in some of the Cases authorities that B might have an action of Trespass quare Clausum fregit for Cutting down Corn or doing injury to the Crops while growing (but A can't be joined in the action) - but it is to good point to A by way of rent for the use of the Land. he is regarded as to all intents a Tenant for years and by holding the Land at an annual rent and it makes no difference whether that rent is paid in money or with a part of the Crops &c. &c.

Bull N.P. 85.
Esp Dig 402
2 Salk 77.

When a Trespass is committed on the Land of a married Woman she and her Husband must join in bringing the action - if she Survive she can bring it alone.

Cro Eliz. 96
Do — 133.
Esp Dig 404

Joint Tenants. Tenants in Common. and Co-parceners must all join in an action of Trespass done to their Land. because their possession is joint and though the Estates of Tenants in Common may be severed, yet the damages done can't be severed. if they could they might all maintain the action Separately

Litt 321.
1 Inst 198.
2 Bac 194
2 Hobs. 387
Esp Dig 404.

If a Commission of Bankrupt is issued against one who is not a subject of the Laws of Bankruptcy - as a Foreigner a Lawyer &c and the assignees take possession of his or her Lands they may maintain an action of Trespass against the assignees - as it was a void assignment. —

3 Wilson 382
Esp Dig 398

For what Injuries this action will lie.

It is an established rule of the Comⁿ Law. that every Person is liable not only for his own and proper Act but for those of his Cattle if they by his negligent Keeping, or if by his Procurement do any hurt to the Land &c of another.

2 Bl Com 211. 5 Bac 179

In this case there is no need that the owner of the Cattle should have previous knowledge that they were mischievous for he is accountable for injuries done by them. whether he knew they were accustomed to do mischief or not. — So it is otherwise as to Dogs and some other animals. —

The action when the Cattle do the mischief is a "Juris Clausum fregit." — but when a Dog, commits an injury, an action on the Case lies.

2 Wms 565 5 Bac 181.

But if one man Calls on his Neighbours land and the insufficiency of fence which it was his duty to maintain he cannot maintain and the action. for it is his own fault if any damage ensue.

In cases of this kind where damage is done by another Cattle than the party injured and that the law of two remedies either to distrain them damage feasant — and hold them until satisfaction is made, or he may bring this action of "Juris Clausum fregit" — Either way is one of them as good as a plea to the other — as the Law will not allow the party injured to have two satisfactions.

2 Bl Com 211 5 Bac 179 Cro Jac 386

Salk 458 12 Mod 363 Cro Jac 387

This action lies against one called an Stylled
or called &c & one shd part[ners]. Calld for another
for any injury done by the Calld hop[artners]. — 2 Rolle 546.
5 Bac. 188

Lord Holt's opinion that the action can be maintained against either of them &c & the writer owned

I have observed that where one may enter on the Land of another without his Consent and that the owner is not always liable for the injuries done by his property to the property of another — I would here remark further

That if the Tree of one grows on the Land of another he is not liable for the damage done by it, and he may go on and take it away without being guilty of Trespass — & though he is without remedy the Tree is the property of A and is not on the Land of B. by any fault of A but by an action inevitable but the act of God — 5 Bac. 178
2 Bl. Rep 895
Doug. 719

But if A in lopping a Tree let it fall on the Land of B. when he might by proper precaution have prevented it he can't go after it without committing a Trespass. In like it is the act of A. in the former and the act of God —

But it is laid down as a General Rule that if A's Trees grow on the Land of B and do damage A is liable for the damage done 2 Wils 257-8 D[itt]o — 395
I think this rule laid down too general — it must be taken for granted that this happened by
Act —

the negligence of the owner. If a tenant is not
Dav. 76. correct & time done by inevitable accidents —
5 Bac. 178. otherwise Trespass will not lie but the remedy
must be by an action of Trespass on the Case.

2 Roll. 565 If A & B seise & take and put into
5 Bac. 178 B's Cart he has a right to go and take him away.

And so in all cases where one goods are
Salk. 120 falln upon the Land of another by inevitable
5 Bac. 178 accident he may go and take them away, as if the
Goods of A be falln on the Land of B. he may go
and gather it.

1 Ed. Ray. 632 But if his Goods after the roots of A.
Bulst. 185 grow extend into the Land of B then are Tenants
in Common as to the fruit of the Land.

If A is found to repair a Bridge which
5 Bac. 179 he cant do without entering on the Lands of
another he is justified in so doing. "it must stand"

2 Roll. 567 If A has sold Trees to B standing on
5 Bac. 180 his Land. B has a right to go and take them
for this right was included & given in the Grant.

1 Ed. Ray. 725 If two are bound that the other shall
6 Mod. 163 come on the Land another as injury & not
Contra. by abuse shall for the purpose of landing a Boat
13 Hen. 36 and other water craft was not a Trespass but
Cro. 266 in true modern Law that was denied to be Law
3 Keb. 253. & may indeed be allowed by Custom Contrad -

But it is well established that if a publick Highway is in any manner obstructed so as to render it impassable a Traveller may go on the adjoining Land. ——— 1 Salk. 358 Dyer 716 2 Roll. Rep. 28 3 Keb. 263 2 Bac. Com. 36 Esp. Dig. 400-1

But this Rule does not hold as to private ways because here the Public are not invited in the travelling on a private way and the above Case holds it is the duty of the Grantee to keep it in repair. ——— Dyer 716 Taylor vs Whitehead 2 Bac. Com. 36 Com. Dig. tit. Chemin D 6

A Person can't maintain an Action for an Injury done to Grass growing on Land to which he has a mere right of Common for the property is not his — his right is merely incorporeal. — 2 Rolle 552 5 Bac. 167 2 Bac. Com. 33

If the entry of one into another's House is deemed a Trespass even though the door is open if he has no license nor authority for the Law deems that a violent entry. ——— Rowden 71 2 Rolle 555 2 Roll. Rep. 208 2 Bac. Com. 33 & 63 5 Bac. 182

But if one person has unlawfully taken the Goods of another into his House the owner of the Goods may without permission go and peaceably take them away — but he cannot enter if forbidden or if he has to break the Door. Cro. Eliz. 740 2 Roll. Rep. 50 5 Bac. 182

And it is a Gen.l Rule that any Person may enter the House of another with force for the purpose of suppressing a riot or affray or to which case the person entering may be justified. — 5 Bac. 182

I have already said that one Person may enter the House of another to pay, demand or receive Money, that he owes or is due to him whereby given. — And an Officer has a right to enter for the Purpose of executing any Legal Process if the Door being open

3 Com. 312
Ess. Dig. 380

Kirby 383
2 Bac. 454
5 Coke 91
1 Leonard 41

Again a House may be broken open for the Purpose of executing a Criminal Process if the Officer previously demands Admittance and makes known his Business — but he is not justified until he has made such demand.

But an Officer may justify breaking open an outer Door or Window for the Purpose of executing a civil Process either to take the Body or Goods — or the ancient Common Law regard every man's House as his Castle — The reason given for this was, that "Fire and Sword, Thieves and Robbers might be let in." — But this Law was in Feudal times every Person was considered as a petty Tyrant over his Property. —

5 Coke 91
Cowper 1.
Croke 2 vol.
Hobart 62

But this Privilege of Castle is now confined strictly to Dwelling Houses and extends to outer Doors and Windows after an entry an inner Door may be broken open — but if his entry unlawful by Force he may be broken inner Doors. — But this Privilege extends only to Persons being in the House and not to Strangers in it

Cowper 6
Hobart 62
D° — 263.
Ess. Dig. 604

This Privilege does not hold against a Writ commanding the Sheriff to give Possession of the House. For by the nature of the Writ it must be executed in any other way, than by taking Possession of the House. — 5 Coke 91. 2 Bac. 179. 5 Bac. 183.

An Office is also justified in breaking a House for the purpose of making a Legal Search Warrant. — It must be observed that all general Search Warrants are illegal — as they search all Houses, or any House which the Officer shall think proper. — 1 Hale P.C. 150. 1 Vent. 31. Willes 91. Do. 275. Ld. Raym. 699. Carthew 404. Salk. 418.

The Law is now settled that no Search Warrant is legal unless under these Restrictions — 1st The Party applying must first make oath to the facts which induce him to think the Goods are in any particular House &c. — 2nd That he believe them to be in such particular place. 3rd The Warrant must be executed in the day time (or the Office will be unjustified) — 4th It must be executed by a known Officer, and not by any person specially authorized for that purpose 5th It must be always executed in the presence of the Informer, so that he may direct what place shall be searched — (And if after all the Informer does not find the Goods he is a Justified. ab initio. — Hence they and all General Search Warrants are very dangerous things, and consequently very seldom used. — 1 Hale P.C. 150. Ld. Raym. 399. 2 Williams 291. Do. 292-3. Ld. Raym. 399. J. Gould Esq.

Against whom this Action will lie.

Litt Sect 71. 4 Coke 62 Allyn 83 Esp. Dig. 401

It is a Gen[e]r[a]l Rule that this Action will not lie against a Lessee for Years for cutting Timber Trees - because the Lessor is not intitled to them. It is a personal Remedy, & by act & Action of Waste. —

But if the Lessee having cut Timber suffers it to remain on the Land untill so that it becomes a Freehold Chattel and afterwards takes it away, he is liable to the Lessor in Trespass for damages for carrying away his Timber. — And though "grand Damages pay it" — Nay Treble may be done discretionally in detaining Timber long the Timber must remain in order to become a Freehold Chattel. However it has been settled that if it remain one day he can't take it away without being a Trespasser.

4 Coke 62 Co Litt. 57 Esp Dig. 400

5 Coke 13. Rolle 860 Litt Sect 71 Co Litt. 57

And an Action will lie in favour of a Lessee at Will against his Lessee for cutting whether reserved or not —

2 Bl Com 150 Esp Dig 400

But an Action will not lie in such cases against a Tenant at Sufferance untill the Lessor had entered.

But though in a Lease for Years the Trees are reserved still the Lessee is not liable for any injury done to them by his Cattle &c.

8 Ray 739

for the Lessee. has right to the Land and to Esp. Dig. 400.
turn it into Wasted ground. of the Owner.

It is said that an action of Trespass Hobt 134
will lie against an Infant. Idiot or Lunatic Salk 13. 410.
as the intention is here immaterial. 5 Bac. 184.

And every Person Concerned in Trespass 1 Levins 124
is liable as a Principle. There are no Acces- Salk. 409
saries in Trespass. Haly. C. C. 613.
4 Bl. Com. 36.
5 Bac. 185.

So it is said if A agrees to a Trespass com- 5 Bac 185.
mitted for his Benefit by B. A is liable tho.
he did not demand or request it. by agreeing
to it is meant his actually taking the benefit
of it.

If several Persons join in committing 8 Coke 159
one Trespass. the Party injured may bring 5 Resp. 64.
an action against one. two or all of them.

Bacon lays down the rule differently 5 Bac. 185
and says that if the Party injured brings his Ac- for Bacon Case
tion against one of them. the pendency of that
suit is a bar to another suit against another 5 Bac 192
of the Trespassers "for the same Trespass" — Resp. 420
but this is not said by this can only be meant
that the Person shall have but one satisfaction
but he may have an action against the other
until he has obtained satisfaction.

But though the Pff. can have as many Co Eliz 330.
actions

personal actions as these are. But a Jury gives
4 Bac 115 the Cause Judgment in only one. a Recovery in one
Co Ja 73. is a bar to an action brought against another for
Hobb 66. the same Trespass. thus differs from a Joint in-
Esp Dig 415 dictment for in that case he may punish either
Dig 416 or all the parties. no Judgment or Execution
Action 67. though if he has collected or taken out Ex.
against one for the whole amount of the debt
the other may be relieved from at the Ex. by
an "Audita querela".

It is also said by Bacon that an acquit-
5 Bac. 185 tal in one action is a good bar to an action
afterwards brought against another of them.
This is not Law.

If a person who has granted the Reversion
Dyer 285 or Inheritage of his Land to another disturbs
+ 6 Bac 187 the Grantee in the enjoyment of it he is liable to
an action by the Grantee. and if a Stranger
after Granted may have his action against
the Grantor and Stranger.

18 Edw 139 This action will be also in favour of a
Lessee for Years against his Lessor &c.

It is settled that if A's Cattle by Trespass
Jenkins 161 the default of B's. come into the Land of B. and
1 Freeman 379 there. through the default of C's fence go to the
+ 5 Bac. Ab 189 Land of C. C may maintain an action of
Quare Clausum fregit against A.

The reason

The reason is that C is bound to fence only against such Cattle as his adjoining proprietor puts on the Land. — A Lessee is not to suffer any thing to be done whereby his action on the Case to indemnify him. — Authorities cited

Pleadings in this Action.

When the Tort complained of consists in the abuse of an authority given by Law, it is sufficient for the Plff in his declaration to state the Tort generally. — Esp Dig 405. Doct 325. Bull NP 81. 1 Roll 479. 3 Do 292. Salk 221.

But if the Defendant in his plea justifies the original act the particular injury or abuse must come out by replication, by way of "new assignment." (which is a statement with particularity of those acts which before were stated generally.)

The Issue if the plea contain several distinct Traverses in one action or declaration as calling his Horse at one time taking his Horse at another and taking his Goods at another &c — Can these be demurred to, as may distinct Counts or those are causes of action. — Salk 119. Ld Raym 61. Wright 190. Esp Dig 407.

And for the purpose of shewing under what circumstances of aggravation the Tort was committed, for the purpose of enhancing the damages he may give evidence of which by themselves he could not maintain the action, as stealing his Wife &c — Ld Raym 61. Peake's Ev 325. Cro Jac 664. Salk 119. Do 642. 3 Burr 1114. 4 Bacon 12.

That Cov. must contradict Sect. the Def. can join in an Action of Trespass peculiarly to Pl. the Beating of his Wife Child. order & by, a" per quod Servitium amisit". ——

Salk. 642
2 Ray 1032
2 Rep. 166
Carthew 113.
Stiles 143
D°. 202
Ed. Def. 407.

The Cov. must clearly show that the Act Com. Plained of in the Beating &c. was part of the original Contract and Committed at the same time with the Beating the Husband may sue for it alone as Committed in Continuity. — But if the Beating the Master be at one time and the Beating the Servant be at another they can't be joined they are deparate Causes of Action

2 East 154
Salk. 642.
8 Rep. 133 a.b
Hob. 346
1 Chitty on Pleading 386.

Where the Beating &c. is part of the same Transaction with the Trespass if the Plaintiff may recover for the whole —

But if the Act not laid a" per quod" he can't claim Loss of Service nor can he give any Evidence of such Loss of Service for the Def. will not impliedly admit any unless alledged.

Cro. Eliz. 32
Ed. Def. 407
1 Ld. Ray. 283

The Cov. laid in the Declaration as the Husband knew the Trespass was committed is not equivalent to the Plaintiff saying in his Declaration that he knew it. He knew & can Committed on one Day and knew it on another —

Cobi. Litt. a
1 Burr. 285

But the Day may become material by the Justification of the Def. on a certain Day so that the mere only that the Day is not "Time out of mind" material.

But it is said and by high authorities that where the action is brought against one if Participes or the Declaration that any one who was in any way concerned in the Trespass is not joined the Declaration is not good. This is now certainly not Law indeed it is abused and not found ed in Principle

If a Trespass is committed by two or more the Pff may bring his action against any one or all of them as he pleases. ——

And it has been a long established rule that in Trespass the Pff may bring his action against one and bring the other as Evidence against him when the Trespass is committed by two. ——

Holt 27 +
Holt 164.
1 Leon 141
5 Bac 192

1 Saun 296
Salk 32
6 Mod 166.

And it was always agreed that if the Declaration charged the Trespass as having been committed by the Defendant and one unknown to the Pff it was good. — This is a strange distinction. the truth is it makes no difference whether known or not. —

1 Leon 41.
Str 426 +
5 Bac 193 +

The usual practice and more Lawyer like method of proceeding is to take no notice of any other Trespasser than the Defendants. for the fact of each is the act of all

It is stated at Com. Law in declaring in this action to lay the Trespass to have been done "vi et armis" and "contra pacem" — and the words of that averment cannot be aided by Verdict. —

Cawthw 66
Do 390.
4 Bac 11
Salk 636-40
Litt 168
2 Bacon 360.

The reason is that C is bound to save only such Costs as his Attorney undertook that he should recover. A Bond is not to suffer him only from his Action on the Case against B to indemnify him.

Not Printed. See page 28

The reason of the last Rule is that at Common Law on Conviction of Force & the Party was liable to a Fine of £6 8. to the King for the Breach of the Peace. - But not in Case not standing in force. Since it was necessary to be alledged to be with force.

2 Bac 506-7. 5 Bac 191-3.

But now by Statutes 16 and 17 of Charles 2d. the omitted of these words "vi et armis" may be supplied after Judgment. - Though it would be ill on a Gen.l demurrer

Salk 636. Esp Dig 408

And now in England by Stat.e of 8th & 9th Will.m and Mary. the "capiatur finis" is taken away. Though the Plff is now to pay the Fine of £6 8 to the Crown and recoup it from the Defendant by way of Costs. - and a Judgment nil Miserecordia is given instead of a Capiatur. -

2 Bac 507. 5 Bac 190-1.

It was once moved and taken by Lord that the words "vi et armis" and "contra pacem". - were not necessary. This Rule

Ld Ray. 985 5 Bac 191-2

however is not Law - if not alledged the Plff. can in England recover his Costs &c. &c

In Court and I perused throughout the W.A. the words "& damnis" &c are matter of substance for here we have no fine to the public — and they were once decided by our Supreme Court in 1796 not to be useless even of form and that a Declaration without them was not ill on special demurrer —

But this question M.Good thinks was unauthorised & that they are matter of form and that only.

J.Good Esq.

It is a Gen.l Rule that the injury for which an action of Trespass is brought must be specifically and specially alledged in the Declaration

5 Bac 197
1 Sid 225

It follows from hence that no evidence can be given of any particular wrong for which damages can be claimed unless that wrong be specially alledged in the Declaration.

To the above rule there is one exception viz where the injury arises "ex mesne Causa". — Here it may be pursued generally: out of Summary &c. —

1 Sid 225

It is also necessary in declaring in Trespass to state the value of the thing for the taking or injury of which the action is brought, otherwise the Declaration is ill

1 Sid 39
3 Levins 230.
Do. 430
Cro. Jac. 407.
for Pl. Judgt
Lord Ray 113
Read on this
288 : 497

But it is not necessary in all Cases to state the quantity of the thing taken or injured

injured. though it should in general be stated but where it is impossible to ascertain the quantity it is a new law, to state any. - as the battery which has been committed by a horse. - The omission to state in the Declaration the value of peculiar is aided by Verdict. this I take it is correct in practice

Cro Ja 435
4 Burr 2455.
Esp D 407
Cro Ja 130.
+ 5 Bac 196

It a Gen Rule that the Pltf alledging the trespass to have been committed on one day, he cant recover damages for other on other days.

In the case of a permanent & mixed where the injury is such as is capable of continuance and is thus continued or renewed from day to day, the whole damage done may be recovered in the action by laying the action by a "Continuando." - - or by injury done by cattle in treading down the grass &c on different days. - -

3 Mod 212
Ld Ray 240
Salk 638
5 Bac 197.
+ 2 Rolle 545.

But where several trespassing acts are committed which terminate in the nature so that so that being once done they cant be renewed or continued they cant be laid by a "Continuando" as they dont run into each other but are distinguishable as entering on another Land and cutting, erect to day, and cutting and cutting more removed &c. in this case all the several acts may be laid in one Declaration as having been done "at divers days and times." or "between such and such days". -

Ld Ray 239
Dean 975.
Salk 638 9.
3 Mod 212
1 Saund 319
Ld Ray 833
Esp D 407.

But if several Trespasses be charged and only one day laid in the Declaration the Pl. can recover for no more than what was done on some one day — So if laid in the Declaration that Trees were cut on the first day of June he may prove it done on the tenth. — 2 Ld Ray 240 D° — 976-7. Salk. 639. Esp D. 408.

But where they can't be laid by a Continuando it is the other way, to lay, acts to have been committed "between such a day and such a day." —

There are two modes of charging Trespasses with a "Continuando" —

1st It may be laid for the whole time "from such a day, to such a day" — where the Trespass is committed without intermission. — 5 Bac 197-8-9. Jenkins. 124. 2 Ld Ray. 240 +

2d But if committed by intermission and where there is no Continuity. and the acts are committed at different times it should be charged with a "Continuando" or divers days. and at divers times from such a day to such a day. — This distinction is not noticed in modern practice they say McGould —

But where there has been an ouster of Pl. possession and reentry. the ouster and all intermediate acts may be laid with a "Continuando" for here the Trespass was continued without intermission for the ouster was the principle Trespass and the other acts were necessary to it. Cro Eliz. 182 2 Ld Ray 975. Salk 638.

And this rule goes still further for if after the Plff. has been dismissed and restored and is again ousted and restored he may lay the whole with a "Continuando."

2 Ray. 977 — 1 Saund. 241 e

Or in the last case the Plff may allege the case specially.

For pinedents. Sheaden. Assistants - 502.

If a trespass which cant be laid by a "Continuando" - as so laid the Declaration is ill. the action is fatal and is ill not only upon general demurrer but after judgment.

Salk. 634. 1 Levins 210 Cf Dig. 408.

But if some Trespass cant by a Continuando" - may be so laid and other which cant are so laid. the Declaration is good before and after judgment. - for such is a case of action. and the insertion of the Trespasses cant make the Declaration bad

Cf Dig. 408. 3 Levins. 94 1 Ld Ray 239 Salk. 634. 2 Shower 190

Thus far of Pleadings on the part of the Plff.

Pleadings on the part of the Defendant

The general Issue in this Action is "not guilty" as in all cases of Torts.

Cf Dig. 411

If a person indicted for Trespass and confessed it and his confession had been recorded he is forever after estopped to plead "not guilty" in a subsequent action for the same Trespass.

2 Hawkins 333 Cf Dig. 411

There would seem to be an inconsistency between this rule and the rule of Evidence that an allowed [illegible] not

See Title of Evidence 434

of record can be produced in evidence only between
the parties and their privies, but there is none
this latter rule applies only in Civil actions

1 Jones Ex

At Com. Law a special justification must
be pleaded specially, and cannot be given in evidence
under the General Issue — because it contra-
dicts his plea — the Gen. Issue denies the fact.
but a justification admits the truth of the fact
avoids the fact. — But this may be done in Evid.

1 Bust. 281
Stiles 61
1 Salk. 397
Salk. 287

But a Defendant when sued in this action
may give in evidence under the Gen. Issue
that he is Seised for Years to the Plff. — and
thus defend on the ground of his interest in the
Land — thus is not strictly a justification but
a denial of the Plff's declaration &c. — — —

2 Rolle 676
Cro. Jac. 411

So also under the Gen. Issue the Deft. may
justify that he is Tenant in Common with the
Plff.

Salk. 4
5 Mod. 650 +
Cro. Jac. 411 +

If the Defendant be Tenant in Common
with a Stranger he can't give it in evidence.

Salk. 4

Where a Sheriff is sued in Trespass for acts
done while executing final process he may jus-
tify under the Ex. without pleading the Judg-
ment which the Ex. was issued — for the
Plff is a party to the Judgment

Salk. 408

But where the action is brought against the
Sheriff by a Stranger to the Judgment the Sheriff

3 Levins 20.

must shew the judgment as well as the Execution.

A Sheriff recovers a Land & Ejectment against B. and afterwards A. orders some persons by his direction entire to execute the Ejectment ——

If in this Case an action is brought against A. (the Sheriff in the former action) or against the Stranger they are to shew the judgment as well as the Ejectment altho' quite at their peril - But the Sheriff entering in this Case is bound to shew only his Ejectment as he is bound to act in pursuance of the Ejectment.

5 Bun 2631. 2 Wils 301. Salk 733.

But in Replevin observed if the action is brought by a Stranger to the Judgt against the Sheriff acting under an Ejectment the Sheriff in justification must plead the Judgt as well as the Ejectment for the Stranger is supposed to know nothing of the Judgt nor to have the means of knowing it. A Sheriff cannot be bound by act to avail B.

Salk 107. D° 409 Cro. Eliz 412.

Any person acting in aid of the Sheriff and his request may justify as the Sheriff may; this justification will have the same.

An Accord and Satisfaction is a good plea in Bar to an Assumpsit - but an Accord alone is not a good plea. for it is a Case executory agreement which is no plea in Bar in any Case. it must in fact be executed. The settled way to plead an Accord and Satisfaction is to plead Satisfaction only. Every thing else before and after

2 Cro. 80. 2 Roll. 543. Winch 39. Bacon Abridg. Accord & Satisfaction. H. Pleading 19.

To plead by accord is to plead the promise & stipulations of the accord — But in Satisfaction is to plead that he delivered and the Pff. accepted a certain Satisfaction — 1 Rolle 138 +

An Award of Arbitrators is also a good plea in Bar of this Action — Co Elizr 66 Cro Jac 415

A Release is a good plea in Bar of this Action — But if the Defendant pleads the Release to have been given before the action brought there must be a Traverse of all the subsequent time i.e. the Defendant must deny that he was guilty of any Trespass after the Release given. — Because the Pff is not bound down to the day mated in his Declaration. Hob 66 — 104 Salk 232 2 Ray 929

If an Action is brought against several Persons for committing a Trespass jointly — a Release to one of them is a Release to all of them — Hob 66 4 Burr 382 5 Coke 97

Therefore if that the act of one is the act of all and so the whole Trespass being considered as committed by one Consequently a Release to one is of course a Release of the whole Trespass. Cro Jac 444 1 Ventr 232. 1 Mod 37 +

But if an Action is brought against two or more — who severs in their plea, and one is found guilty, and damages assessed against him. the Pff may enter a Nolle Prosequi — as to the others — and this will not discharge the joint — formerly it was not allowed — Hob 70. Cro Jac 211. Cro Eliz 415-16. 1 Saunders 207 n 1 Lev 19 1 Wilson 60

dubitat. Jn. It was formerly holden that if the Pff. entered a "Vale Prosequi" before Rule to plead as to one Defr. sued — it abated the action as to all the Defrs.

And if the Pff. has sued one Joint Tres-
Co. Jn. 73 passer, and recovered against him this is
Yelverton 678 pleadable in Bar for any other action that
Co. Eliz. 30. another of them can for the same Trespass — for
4 Bac. 115. the Pff can have but one Satisfaction &c.
+ Raleigh 210.

It is enacted by the English Statute of
21 of James 1st that if a Trespass is indob.
Fitz. 549 willam the Defendant may plead a Disclaimer
Silk. 686. and that the Trespass was involuntary,
Ed. Dr. 416. and that he has tendered sufficient amends
+ 2 Rolle 507. to the Pff. before action brought — and thus
amounts to a good Plea in Bar —

At Common Law this is no such Bar as
pleading a Tender in Bar of Trespass. It can
be good Plea in Cases of liquidated Claims &c
We had no such defence in Conn.

The Statute of Limitations is a good
plea in Bar of this action.

The Limitation in England for bringing an
action of Trespass is 6 years in Conn. 3 years.
+ Eng. Dig. 416 In England the Stat. Limitations must
Stat. Conn. 273 be specially pleaded — In Conn. it may be
under the General Issue "not guilty" &c

A Special plea of Title in this action is not allowable at Com. Law because it amounts to the Gen. Issue - and the rule is that whatever amounts to the Gen. Issue must be pleaded as the Gen. Issue - This rule however is evaded by giving Colour as formerly now giving Colour is alleging that the Pff. has some Color which is insufficient in Law - but that the Defendant has a better claim &c.

N.B. this giving colour is a meer fiction of Law -

3 Bl. Com. 309
4 Bac 102.
10 Coke 90
Sayer on Pleading 51.
D. 126. 150.

But in Com. Pl. the Defendant may always plead the Title Specially - see how &c. that &c. enough on the subject - but one thing does seem to astound it and which points out the Course to be pursued when he does plead it &c.

4 Com. Dig. 667.

The Defendant however is not bound to plead the Title Specially he may give it under the Gen. Issue. -

This Stat. provides that in an action of Trespass before a single Magistrate the Defendant shall justify on a plea of Title and a Record shall be made thereof and the nature of such Title shall be made "pro Confesso" - and the Defendant shall become bound with sureties to prosecute his Claim and if he refuses to be bound his plea shall abate &c. i.e. he shall have no hearing on that plea for the Court shall try the Cause as upon the Gen. Issue.

4 Com. Dig. 662

But if the Defendant does become bound the Statute is not to require him to bring an action but to read the words certified in the new County Court Act there is something strange in the Phraseology of the Statute.

The Statute further provides that if 8 Geo. 662 the Defendant does not produce his Title the Pltf shall recover double damages and Costs.

Under the Gen. Issue the Defendant may rely upon his Title before a single Magistrate but he cannot try a question of Title when put in issue for the Issue thus found would be conclusive against the same parties in a subsequent Cause of the same kind.

It has been determined by our S. Court 2 Swift 79 that a Judgment on the plea of Title is no Kirby 395 bar to an action of Ejectment by the unsuc- This Case cessful party. This decision is believed to be not Law erroneous and that it arose out of a confu- says M. Good. sion of principles and from the rule of Com. Law that an acquittal or recovery in an action is such a bar to an action of a like nature &c. — Thus it is said by this decision if A brings an action of Trespass against B. and Title is found against B. now this does not bar an action of Ejectment against A. — Here it is not Law —

The Defendant having removed his Cause to the County Court. he Can't change or alter his Plea of Title as made before such magistrate and which arises from necessity as he might otherwise oust the Jurisdiction of the County Court. as he has already done what he has the Justice Court by pleading Title. 2 Swift 80.

Rules of Evidence --

In this action as in every other the Evidence must always follow the Issue. Hence no matter of fact which goes to the merits of the Case and which is not embraced by the Issue. Can be given in evidence --- Under the Allegation of "other encumbrances." the Pff may give in evidence any matter of aggravation which will not of itself support an action. e. g. 2 Root 1165. 3 Burr 1385. 1 Esp Dig 328. 2 Dunn 1114. Esp Dig 417.

But no evidence Can be given of a fact which would support an action itself unless the fact is alledged. — So the Pff Can't allege under his "encumbrances" that the Defendant beat his Servant. and that he lost his Service for that latter allegation is of itself a ground of distinct action.

It is not necessary for the Pff to set out the Quantity of his Land. but he must prove them as laid. i. e. substantially though he would not be bound to the greatest precision. — Esp Dig 417. 2 Root 477. Sylvester 114.

When the action is laid with a "Continuando" the Plaintiff cannot give in Evidence any thing before the time mentioned in the Declaration, because the Jury by their Verdict find the Issue only upon the Continuando, and not upon the Cause of Action. Bull. N. P. 80. 4 Esp. Dig. 417. Dec. 418.

It is said that when an action is laid with a "Continuando" the Plff must prove a Lease before the action brought, because the Jury by their Verdict find a Possession only from the time laid in the Declaration, meaning as I suppose that he has been ousted of the Possession. 6 Esp. Dig. 418

It seems to be a Gen. Rule that in a Plea of Justification if the Defendant proves so much as amounts to a Justification in Law, he proves enough to support that Defence, though he does not prove all in his Justification pleaded. Gilbert on Ev. 118. 4 Esp. Dec. 419.

When an action is brought against the Sheriff by a Stranger (in the Case before Mentioned) notice of the Sheriff must be given in Evidence a Copy of the Judgment as well as Execution. 2 Ld. Ray. 733. 2 Bl. Rep. 701. 5 Burr. 2631.

For the Assignment or detaining of Damages in Case brought against two or more see Title of Assault & Battery. 4 Esp. Dig. 420.

For Rules as to Costs in this action vide 1 Conn. 677.

Finis.

Waste

by J. Gard Esq. March 1812.

Waste is defined to be any Spoil or Destruction of Land. House Trees or other Corporeal Hereditaments. to the Disherison of the Kind that hath the Remainder or Reversion in Fee simple or Fee Tail. — 2 Bl Com 281 a; 1 Inst 53; 5 Bac 455; 1 Rems Dis Tour of Eq 9; Co Lit 53 a 386

There was formerly a distinction made between Waste and Destruction thought it is not now attended to. —

There are two kinds of Waste Voluntary and Permissive.

Voluntary is occasioned by some positive act of working or Spoil or by an act of Commission. —

Permissive Waste is occasioned through the negligence or omission of the Tenant for Life or Years. and does not suppose any positive act. 2 Bl Com 281; 1 Inst 53; 5 Bac 457.

Yet if the Lessee for Years Covenants to do no Waste the Covenant is broken as well by Permissive as Voluntary Waste. Dyer 281; 2 Inst 145

In Gen. any Spoil or destruction which occasions a lasting injury to the Freehold is Waste and may be either in Lands. Buildings or Trees

1st Waste in Buildings.

2 Bulstrode 113.
4 Coke 64.
Cro Eliz 329
D° 374.
3 Mod 381.
2 Rolle 815.
Co Litt 53ª
Moore 177.
2 Coke 64.

Not only demolishing or burning a House is Waste. But also the voluntary removal of any thing annexed to the Freehold of the House be it Waste as the timber, floor, doors Windows &c &c.

Even though the Lessee remove any thing which he himself has annexed to the House it would be Waste.

Cro Ja. 182
2 Rolle 814
1 Bevins 309-11
Mod 94
2 Bl Com 282.

Changing the Structure and use of the Building is Waste even though the value of the thing is thereby is enhanced and it be for the benefit of the Lessor as changing a Grist Mill into a Fulling Mill &c. For this is an injury to the Mill as it was viz the Grist Mill. and is as to the Grist Mill a destruction of the remainder man or reversioner &c —

1 Inst 53ª
2 Rolle 815.
5 Bac 461

So suffering a House to decay for want of necessary repair is permissive Waste. for the Lessee is bound to keep it in repair unless excused by express Contract.

And in this last case the Tenant is liable for such permissive waste even tho there are no Trees on the Land to make such repairs when the Lease is made. for he should have provided an Exemption —

Authorities supra.

But if the

But if there was sufficient Timber on the Land. then Lessee to make such repairs. and the Lessor. cuts and carries them away. the Lessee is not liable for Waste occasioned by want of repairs. - for this would be practising an imposition on the Lessee. by obliging him to do what he never contributed to do. —
The authorities are not all agreed on this point. though I take this to be the better opinion. -

Hob. 234
2 Rolle 815.
4 Bac. 461.
D° 466.
2 Rolle 822
Moore 7.

The erecting a new Building on ground where there was none before agreeable to the better opinion is no Waste however
Tho. if the Lessee takes the Lessors Timber for this purpose it is Waste.

Hob. 234
5 Bac. 466.
2 Rolle 815.

So if the Lessee having erected such House at his own expence. suffers it to decay for want of repairs it will be Waste. for it has become a part of the Inheritance which he is bound to keep in repair. and at End owes it Sense.

Hob. 234
5 Bac 466
2 Rolle 815.

But if the Lessor erect a new Building on the Land after the demise the Lessee is not bound to keep in repair. for he did not contract to. and the Lessor can't lay him under any new obligation.

Hob. 234.

If a Building on the Land Premises is uncovered at the time of the Lease and it decay for want of repairs is not a Waste.

1 Inst. 53.ª
5 Bac. 461.
Owen 93

1 Inst. 57a
2 Roll. Abr. 815
Com. Dig. Waste (D) 1
Cro. Jac. 78

At Com. Law the Cutting a Hedge or Lopping a Tree was either negligently or unadvisedly done Waste. But now by the Statute 6 Ann. the Tenant is excused for unadvisedly Cutting.

1 Inst. 53
2 Roll. Abr. 813
5 Bac. Abr. 464
Dy. 47 pl. 7

The destruction of a House by the Kings enemies by inevitable accident or the like, is not Waste. For to constitute Waste the Tenant is always supposed to be actually or constructively in fault.

6 Co. 10 Co. Litt. 53
Moore 62
1 Inst. 53a. in Addend.

But if the said destruction by the act of God be in not Waste yet it is laid down as a rule that if the Building or subject matter is left standing though totally damaged the Tenant is obliged to repair it in a reasonable time or he will be guilty of Waste if for the want of such repairs any more damage ensues.

1 Gould. Rep.

I don't know how far this rule is to be extended but as it is laid down it is certainly too general for it may be that the expence of repairing would be greater than to build anew which would not be required to be.

5 Bac. Abr. 402
1 Inst. 53a.

If the Tenant is actually guilty of Waste yet if he repairs before Action brought it will be cured. The reason however for the advantage of it in pleading specially for it will not support the Grant of Land.

But in the last Case the Lessee after having done or suffered Waste has no right to take the Lessors timber to make Repairs to secure himself from liability. ~~~

2nd Waste in Lands.

Digging and carrying away the Soil is Waste / So to suffer a Wall Bank or other Habitation that stands the Land to decay in consequence of which the Land is injured is permissive Waste

2 Rolle 816
5 Bac 458
Moore 82
Do — 73

If the Waste be destroyed by any act of God the Tenant is not liable for the injuries Consequent. Though if the Tenant neglect repair it within a reasonable Time he is chargeable for subsequent injuries which accrue for want of such repairs. /

2 Salk 453

But to all permissive Waste a good husbandry plot ale Good husbandry is not permissive Waste. — as to suffer Ample Land to be overgrown with thorns and bushes is not Waste.

2 Rolle 814

Generally the Conversion of one species of Land into another is Waste because it changes not only the Course of husbandry but the evidence of the Estate.

2 Rowe 582
Hob 234
Moore 101
2 Rolle 814
Do 816

It doubted whether this rule has ever been adopted in Comm. as notion is more common than for a Tenant for Life or Years to convert one species of Land into another.

J Gould Esq.

5 Coke 22
2 Rol. Com. 280
2 Roc. Ab. 813.
Hobart 234
1 Inst. 53.

If a Tenant for Life or Years cuts down new Mine on the Land he is guilty of Waste unless named in the Lease -

But if Land is already an opened Mine & the Land the Tenant dies with he guilty of Waste for then it is presumed the Lessor meant to grant the Land & the right of working it

3d Waste in Trees.

2 Rol. Com. 281.
4 Coke 62
1 Inst. 53 b.

If the Tenant for Life or Years cuts down Trees (as a Gen. rule) he is guilty of Waste, because growing timber is part of the Inheritance and for the destruction of him is demanded or recovered

Dyer 65 b
2 Rolle 815
1 Inst. 53 b.

And if the Tenant does any thing which the timber decays he is guilty of voluntary Waste tho' he doth not actually demolish the same.

So if enjoined thro' his negligence he is guilty of permissive Waste.

1 Rolle 649
2 Rol. Com. 281.

By timber Trees are meant such as are fit to be used in building - all Trees therefore are not timber Trees -

But Waste in Trees is not confined wholly to timber Trees peculiarly so called the cutting down of Shade Trees near the Mansion house &c. not peculiarly timber Trees is Waste - N.B. Dwarf trees & young trees under 20 years growth are not considered timber so that to destroy is not Waste

Hob. 41 219
1 Inst. 53 a.

1 Quincy 64-5.
1 Inst. 53 a
2 Inst. 643
3 Atk. 95.
2 Rol. Com. 280

What are timber Trees in one County are not of course so in another. so all timber Trees in England are not such Trees, as the kind of Trees not grow Trees. So in Com. the Chestnut Tree is timber but forty or fifty miles north of us it is not to be found. So that any three whatever kind are acknowledged to be timber Trees and are used in building. are timber Trees.

Dyer 65 a
2 Rolle 817.
2 Bl Com 281
Cro Cha 531.
Moore 812.

But to cut Cutlers and underwood. is no Waste. and the Tenant at a proper time may cut as much as he pleases. -

2 Rolle 45 g
D° — 817.
2 Bl Com 281.

The Tenant for Life or Years is entitled of common right to House-bote. Fire-bote. Plough-bote. hedge bote &c. &c. such Wood as is necessary for the repairing of Houses. Fences. implements of Husbandry &c. unless restrained by express Contract.

2 Bl Com 35.
D° — 282.
Cro Eliz 604.
1 Inst. 41.

But tho' the Tenant is entitled to House-bote. yet if the first suffers a House to go to ruin for want of timely repairs and then cuts timber to repair it he is guilty of a voluntary Waste. because a much greater quantity will now be necessary than if the repairs had been made in due time &c. &c. — —

1 Inst. 53 b.

So if a Tenant cuts timber to erect new Houses or to make fences where there were none before or makes any unnecessary waste he is guilty of Waste. he must do this at his own expence.

2 Rolle 822.
1 Inst. 53 b

And tho the Tenant is entitled to such timber as is necessary for repairs yet he is
5 Rep 466 bound to cut down the timber and low the remains
1 Inst 53 b for if he do otherwise & convert the same to making the repairs he is guilty of Waste
for the Law will not allow so great an opportunity to defraud upon the Lessor &c.

And tho the Lessee has covenanted to repair "at his own charge" still he is entitled to the timber mentioned, for this puts him
Moore 23 from the Land. for the Construction of such a Covenant is not that he engaged to furnish the materials for such repairs — and the Law will never deprive the Tenant of this privilege which he has of common right unless by his own express & requisite Covenant he has deprived himself of it.

There are cases where the Tenant may cut timber to make repairs without being guilty of Waste. though he is not bound without his
Com Dig Waste D 5. own Contract to make them —
1 Inst 54 b So where the Lessee Covenants to make the necessary repairs

So where a Lease is made containing a Clause without impeachment of Waste — in which case the Lessee is not to
1 Inst 54 b be able for any waste committed he may
2 Rolle 823 cut timber and make all necessary repairs.

So where Buildings demised are in a ruinous State & the Lessee is not bound to repair them yet he may cut down Timber for that purpose without Leave, quelle of Waste

1 Inst 53 b
2 Rolle 823.
Com. Dig. Wast (D) 5

So also the Branches & Fruit Trees in a Garden or Orchard is Waste. because they are Considered as a kind of appurtenance to the House but to destroy Fruit Trees growing any where else, is not Waste as in Husbandry or pasture or other places where Fruit, are for the bearing of Fruit.

3 Bac 461.
1 Inst 53 b
2 Rolle 817
Com. Dig. Wast (D) 3.

It is doubtful how far the Common Law rule as applied to the Subjects of Trees would be adopted here - Probably should be observed the same as to Timber is certainly reasonable in the same reasons for them does not exist with us. In England and other old Countries Timber is much greater value as being in great demand and very scarce but with us it being a new Country Timber is plenty and far less valuable - Now suppose a Widow to be endowed of new Wood Land it is of no use to her unless she can cut off the Timber - and besides in a new Country Cutting off the Timber may be and usually is beneficial to the Land and not to the detriment of Land in remainder or reversion &c. Thus far of Waste in Houses Land and Trees.

J Gould Esq

Gen. Rules as to Waste.

The breaking down common fences is not visible Waste tho' it may be in ill consequences as if thereby Cattle enter and do damage. —

6 Bac 461
2 Leon 222
4 D° 240
Com. Digest
Waste D 3.

Yet to destroy the fence of a Park in England is Waste

Nay 4
2 Rep 338
2 Rolle 834
Com. Digest
Waste E 1.

In no Case is a Tenant liable for Waste unless the damage done amounts to 40 pence finding on the Journible that De minimus non curat Lex. —

Dyer 19ª
6 Eliz 690.

No person can be guilty of Waste in a place which is not Part of the subject demised. — Now the injury of Waste arises only from the relation ship of Landlord and Tenant or Lessee and Remainderman or Reversioner. — So if the Lessor reserves on the demised Premises certain Timber Trees that then is not Waste in the Tenant to cut Trees for with respect to them the Lessee is a Stranger.

Dyer 19ª
6 Eliz 690
Com. Digest
Waste E 2

But if A Leases Land to B for Life or 21 years with a Proviso that the Lessor may cut timber and the Lessee cuts it is Waste for the Covenant does not make the Trees an exception to the demised Land only gives the Lessor a right to enter and cut them &c. —

So if a Lessee assigns excepting the

The Jues in a certain Close 'A is sued Waste in the Reprise to wit that because the exch law is a mere nullity and therefore they are the subjects of Waste as tho. that had been no such exception made

Ro Eliz - 17
Do C 683.
1 Lewins 49.
2 Rolle 454.
2 Brul 302 +

If a Lease is made containing the clause "without impeachment of Waste" the Tenant is never liable for any species of Waste or in other words those acts which but for these words would have been construed Waste will now not be called so. —

Moore 327
Co Jac 240
2 Bl Com 283
2 Rolle 835.

This exemption can be created only by Deed and must be by the same Deed with the Lease to be a Bar to an action of Waste - otherwise it does not act on the Lessors right to the action - but as a Covenant on which he may be entitled to damages for the breach of it. -

1 Rolle 183
Com Dig 14 -
Waste E 3.
2 Brul 146 +

Yet if Tenant without impeachment of Waste either has or is about to commit any outrageous Waste Chy will intercede. -

A Lease "without impeachment of Waste" made by a Tenant in Tail will not bind his Issue it being effectual only during the Life of the Lessor - as thus if he might disinherit his Issue but the Heir of the Lessor may confirm that Clause if he please which however must be an express Confirmation or the action of Waste will not be barred - receiving Rent is not a confirmation of the Lease.

1 Rolle 183 +
Com Dig 14
Waste E 3.

2 Rolle 823
Moore. 9.
Com. Waste E 4
10 Coke 39 b.
Com. Waste E 5.

The Tenant is now guilty of Waste tho the injury is occasioned by the act of God. If the Reversioner or Remainderman or Reversioner &c. as above page 488

Who may maintain this Action.

By the antient Com. Law a writ of Prohibition lay to restrain Waste but this was taken away by the Stat. of Westminster 2nd and a Bill in Equity have also granted the Prohibition &c. of Waste Injunction.

1 Bac. Ab. Pal 105
D°. -- 121.

This action lies in favour of him only, who has the immediate Reversion or Remainder in Fee-Simple or Fee Tail.

1 Inst. 53 a
D° 285 a
3 H. Com 227.
Hutton 110
2 Rolle 825

This action grows out of the relation of Remainderman or Reversioner. and Tenant. as it can be maintained against a stranger. and lies to obtain damages for that Case of Injuries for which Trespass will not lie - because the Tenant has the right of possession.

The reversion or remainder of the Pff must be immediate. i.e. there must be no intermediate freehold remainder. for if there is the remainderman or reversioner can't have this action and the reason is because his recovery of the thing wasted would defeat the intermediate freehold remainder - Thus if an Estate be limited to A for Life. remainder to B for Life. remainder to C in Fee. C can't have the action against A during the continuance of the Estate to B.

+ Moore. 18
5 Coke 77.
1 Inst. 54 a
Cro. Ja. 488.
2 Roll. Abr. 167
Com. Dig. tit.
Waste C 3.
+ 2 Rolle 824.
16
13 Vin. 53 b
D° -- 218.

But if in the last Case the intermediate remainder to B was only a Term for years B might maintain the action against A because B's remainder being but a Chattle does not require the continuance of the particular Estate to subsist in the meaning that before the thing waited will not defeat the intermediate remainder of his Term. 2 Bl Com 163 Com Dig Waste G3 2 Salk 224

But it is said if a reversion grant an Estate for years and after the reversion is vested the particular Estate is commenced that the intermediate Estate for years will bar his action of Waste. The reason given is because he has granted away his rights. But this reason seems to me a very unsatisfactory one. 1 Inst 54 a. 5 Bac Ab 477 Com Dig Waste G3. 4 Coke Rep 63

If the intermediate remainder for life is limited on a contingency and the first tenant commits Waste before the contingency happens the action will lie in favour of the Remainderman, or Reversioner for tho' the Lessee does not injure the contingent remainderman for his Estate is always defeated. Salkeld 82 Com Dig Waste G2

In the above Cases the action won't lie by reason of the interposition of the intermediate remainder. Where the Law can't give a remedy in these Cases Equity will interpose and give the remainderman or reversioner relief.

So if a Lease is made to A for Life with
Cro Ja 688 remainder to A for the Life of B the life of A com-
Com Dig tit mits Waste during the first limitation then
Waste C 62 he is liable to an action by the remainder man
or reversioner notwithstanding the second limita-
tion to him

5 Co the 76 It is sufficient for the Pltff that he
Myn 82 has the immediate inheritance at the time
Moore 387 of the action brought tho he had it not at the
1 Roll Abr 547 time of the Waste committed.
+ 2 Rolle 825

Moore 71 If one Tenant in Common for Life or Years
Com Dig tit leases his Part to his Cotenant he may maintain
Waste C 2 this action agst him

And now by Stat 6 W & M ch 2 the
the equity of which extends to Joint Tenants
3 Mod 227 one Tenant in Common or Joint Tenant of the
2 D 183: 164 Inheritance may maintain this action a-
+ 2 Roll Abr 1034 gainst his fellow without a Lease. ——
2 Bac Law 197 But the Equity of this Stat is held not to ex-
tend to Coparcenors because at Common Law they
could compel a Partition —

He who has the immediate inheritance
1 Roll Abr 43 either in Fee or in Tail may join with
D 53 him in the action one who has a smaller in-
2 Rolle 825 terest in the Subject provided such interest be
connected with the rest

If the Lessee commits Waste and his

Lease

Term expires before action brought the Lessor may maintain this action for the purpose of recovering damages but not to recover the place wasted — because the Lessee has become a Stranger against whom an action of Waste could lie — his remedy would be by an action of Ejectment

1 Inst 283 a
D° — 285 a
5 Coke 119.
Cro Ja 658.

It is an established rule that the Assignee cannot maintain this action unless he has the same Estate continuing in him as he had when the Waste was committed — & if a reversion after a forfeiture grants away his reversion and repurchases it back again — because the relation of Grant back and Grant is thereby destroyed and can't be revived — and whatever Privacy to their relation destroys right of action.

5 Rep 468.
1 Inst 53 b
D° — 350 a
2 Rolle 825.

At Com Law the Grantee of a reversion or remainder could not maintain the action against the Tenant — because the Tenants liability arose from an implied condition which the Law annexed "that he would do no waste" and it a Gen rule that an implied Condition will do set forth an action only between the parties and their privies —

3 Mod 158.
Cro Ja 145
Moore 870
1 Inst 215 b

But now by Stat 32 Henry 8th the Grantee (action having been given to the Grantor or assignment) is entitled to the action

Against whom Prohibition will lie.

At Com. Law Waste will lie against Tenant for years only. Not Guardian in Chivalry. Tenant in Dower and Tenant by the Curtesy. and the Books are contradictory as to the Case of these the Latter Opinion seems to be that he was liable for Waste.

There certainly can be no reason assigned why he should not be as well as Tenant in Dower or Guardian in Chivalry

+ Gow 46 p. 60
1 Inst 54 a.
2 Bl Com 282.
2 Inst 145
Dr 299. 300

Rook 244.

What has been decided in Com Law that a Guardian in possession of the Ward's Estate is liable for Waste committed by him

2 Bl Com 283
5 Coke 13
2 Inst 299
5 Com Dig 674

It is a point ruled that at Com Law a Tenant of the Common Kind. as Tenant for Life or Years was not liable for Waste.

3 Com 385
Dr - 390

It is however laid down by "Reeve" in his History of the English Law that they were liable for which he quotes "Bracton".

2 Bl Com 283

The reason assigned why they are not liable at Com Law is that their Estates were created by the act of the Parties and therefore when created the Law might expressly provided that he should be liable for Waste But Guardian in Chivalry Tenant in Dower and Tenant by Curtesy

were not liable at Comon Law. because their Estates were created by Limitation of Law. and therefore the Remaindermen or Reversioners could have no opportunity of proceeding against Waste

But by the Stat. of Marlebridge 52 of Henry 3d. and by the Stat. of Gloucester 6 Edward 1st. this action is given against all third Tenants for Life or Years who come in by Limitation or act of the parties as well as Tenants in Dower or by the Curtesy.

5 Rep 40 b.
2 Inst 402
Dr 283.
2 Roll 280

Hence a Devisee for Life or Years is now liable to this action. So also against an assignee for Life or Years for Waste Committed after the assignment

Co Eliz 683
1 Inst 54 a
2 Inst 302

As a Gen. Rule this action must be brought against the accountant who Commits or suffers the Waste. to be Committed through negligence in case the Estate Granted for Life or Years

But if a Tenant in Dower or by the Curtesy assigns the Estate and the assignee Commits Waste the Tenant in Dower or by Curtesy is liable to this action for the Waste committed by the assignee. for as the assignee came into the Estate by the act of the parties and the Tenant in Dower or by Curtesy by Limitation of Law. there is not such a Privity of Contract betwen them. as is necessary to support this action

2 Inst 302
1 Inst 54
5 Comn 676
2 Inst 301

But if the Heir has granted over his reversion his Grantee nor any body else must bring his action against the Assignee of the Tenant in Dower or by Curtesy for the Committs Waste for now as to him the Assignee and Grantee come into possession by the act of the parties. It is such an interest as will support the action - and the priority of interest or estate existing between the Grantee and Tenant in Dower or by Curtesy is of such an ambiguous nature (one coming into possession by the act of the parties and the other by the operation of Law) that the Law will not take cognizance of it. Consequently it will support the action of Waste

1 Inst 54a
D° 310.
3 Coke 23.
13 Eliz B.R. 56

No this action will not lie against an Executors Assignee or Committee

1 Inst 54a
2 Inst 301
1 Cruise 71

This action also lies against an Executor or Administrator who has an Estate for Years in the Hands of the Committs Waste. Or an Executor de son tort for Waste committed by him.

3 Mod 93

If a Tenant for Life or Years Committs Waste and then assigns he is liable to an action

2 Rolle 829.
+ 2 Inst 302.
+ 1 Cruise 71

If Waste is committed by a Stranger the Tenant is liable therefor. - This rule is said not to include a Guardian -

2 Rolle 831
1 Inst 54
2 Inst 303

So if a Stranger disseises the Tenant and then Commits Waste & dies the Tenant is liable

2 Rolle 821
D° 824

The Tenants liability for Waste is with his person, therefore neither Sir Hen. nor his Exr. can be liable to this action for the Waste committed by him. - Tho. if his estate have been confirmed Sir Exr. will be liable in another action. — 2 Rolle 828.

This action does not lie against a Tenant in Fait after possibility of Issue extinct. — 2 Com 283 / Do. 125.

But if he commits an Estrepement pendente Waste the Lr. may issue an Injunction to stay Waste. — 5 Coke 136 / 10 Eliz. 777 / Do. 784

A Lease at Will is not liable in this action. — Supra.

This action will not lie against a Tenant for Life or Years in whose Deed it is contained a Clause - "without impeachment of Waste" - neither will it lie against the Assignee of such a Tenant for Life or Years. — Moore 327 / 2 Rol. 835 / Jones 51. / 2 Com. 283. / 1 Cruis 85.

Judgment and Punishment. —

The Punishment for Waste by the Com. Law and by the Stat. of Marlebridge was only single damages. — 2 Inst. 144.

But by the Stat. of Gloucester the Tenant is liable for double damages and to forfeit the thing wasted &c. the place on which the Waste was committed. — 2 Com 283 / 2 Inst. 363

This action when sued under the Stat. of Gloucester is a mixed action. under the Com. Law and Stat. of Marlebridge merely a personal action. — 3 Com. 114. / Do. — 118.

If a Mansion House Park or Warren all the Timber will not be forfeited. Provided that Park which is walled may be easily separated from that which is not. But if indispensable the whole is forfeited

5 Bac 478

If the Waste is "Voluntary" — the whole Estate will be removed The same rule with regard to a "Fixture of the place or a Park, Garden Houses or Lands

2 Com 384
2 Inst 303
1 Rep 54

Quere. Can Treble Damages and the thing wasted be recovered in the United States?

1 Gould Eq

Mr Gould thinks it may, for the Statute of Gloucester which gives the right in England is equally operative with the Com Law Therefore since the Com Law in that respect is of force there he thinks it may be demanded — The Stat of Gloucester is in affirmance of the Com Law and it was enacted long before our emigration took place to the United States. It is probable then which it may be Considered as binding in some parts of our Country.

1 Wash 328
2 Vin Ab 438
1 Ves 364
Do 381
3 Atk 2
3 Bro 484
3 Ves 549 565
3 Atk 723
1 Cunn 443

So to the enjoyment of Corporeal Rights an Action by way of Injunction lies

Finis.

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